(13)

No. 02-1603 Status: ARGUED

Title: Jeffrey A. Beard, Secretary, Pennsylvania Department of Corrections, et al., Petitioners

v.

George E. Banks

Docketed: May 6, 2003

Lower Ct: United States Court of Appeals for the Third Circuit

Case Nos.: (99-9005)

Decision Date: January 14, 2003

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Apr 14 2003	Petition for writ of certiorari filed. (Response due June 5, 2003)
Apr 14 2003	Appendix of Jeffrey A. Beard, Secretary, Pennsylvania Department of Corrections, et al. filed.
Jun 5 2003	Motion for leave to file amicus brief filed by Criminal Justice Legal Foundation.
Jun 9 2003	Order extending time to file response to petition to and including July 7, 2003.
Jul 7 2003	Motion for leave to proceed in forma pauperis filed by respondent.
Jul 7 2003	Brief of respondent George E. Banks in opposition filed. (Distributed)
Jul 23 2003	DISTRIBUTED for Conference of September 29, 2003.
Sep 5 2003	Reply of petitioners Jeffrey A. Beard, Secretary, Pennsylvania Department of Corrections, et al. filed. (Distributed)
Sep 30 2003	Motion for leave to file amicus brief filed by Criminal Justice Legal Foundation GRANTED.
Sep 30 2003	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Sep 30 2003	Petition GRANTED.
Nov 13 2003	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Nov 14 2003	Brief of petitioners Jeffrey A. Beard, Secretary, Pennsylvania Department of Corrections, et al. filed.
Nov 14 2003	Joint appendix filed.
Dec 10 2003	SET FOR ARGUMENT Tuesday February 24, 2004.
Dec 17 2003	CIRCULATED.
Dec 17 2003	Brief of respondent George E. Banks filed.
Dec 17 2003	Motion for divided argument filed by petitioners.
Dec 19 2003	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Dec 19 2003	Brief amicus curiae of Pennsylvania Association of Criminal Defense Lawyers filed. (Distributed)
Jan 8 2004	Record received from the U.S.C.A. for the 3rd Circuit. (1 box)
Jan 13 2004	Record received from the U.S.D.C. for the Middle District of Pennsylvania. (2 boxes and 1 envelope)
Jan 21 2004	Reply of petitioners Jeffrey A. Beard, Secretary, Pennsylvania Department of Corrections, et al. filed. (Distributed)
Jan 26 2004	Motion for divided argument filed by petitioner DENIED.
Feb 24 2004	Argued. For petitioners: Ronald Eisenberg, Deputy District Attorney, Philadelphia, Pa. For respondent: Albert J. Flora, Jr., First Assistant Public Defender, Wilkes-Barre, Pa.

Supreme Court, U.S.
FILED

(1)

No. 02 1603 APR 14 2003

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IN THE
SUPREME COURT OF THE UNITED STATES

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; JAMES PRICE, Superintendent of State Correctional Institution at Greene; RAYMOND J. COLLERAN, Superintendent of State Correctional Insitution at Waymart; COMMONWEALTH OF PENNSYLVANIA,
Petitioners,

v.

GEORGE E. BANKS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTIONS PRESENTED

1. Does this Court's decision in Mills v. Maryland, 486 U.S. 367 (1988), constitute a new rule of law that cannot be applied retroactively to award sentencing relief to a prisoner whose conviction became final before Mills was announced?

(Answered in the negative by the United States Court of Appeals for the Third Circuit.)

2. If Mills applies retroactively, where a state supreme court has rejected a Mills challenge because neither the trial court's instructions nor the verdict form advised the jury that it must be unanimous as to the existence of mitigating circumstances and, to the contrary, made clear that unanimity was required only to find aggravating circumstances and to impose a sentence of death, is that decision a reasonable application of this Court's precedent?

(Answered in the negative by the United States Court of Appeals for the Third Circuit.)

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ORDERS AND OPINIONS BELOW

The United States Court of Appeals for the Third Circuit originally granted Banks' Petition for Writ of Habeas Corpus, and ordered a new sentencing hearing, on October 31, 2001. App. 72-120. The basis of this ruling was a perceived violation of Mills v. Maryland. On June 17, 2002, this Court reversed the judgment in a *per curiam* opinion, remanded the matter, and directed the Third Circuit to decide the question of whether the Mills rule can be applied retroactively. App. 60-68. On January 14, 2003, the Third Circuit held that Mills should be applied retroactively; the court's latest judgment and opinion is reported at 316 F.3d 228 (3d Cir.), and is reprinted in the Appendix at App. 1-57. The panel also re-adopted its earlier holding on the merits. App. 38. The August 18, 1999, order of the district court denying the petition for writ of habeas corpus is reported at 63 F. Supp.2d 525 (M.D. Pa.), and is reprinted in the Appendix at App. 129-176.

STATEMENT OF JURISDICTION

This is a federal habeas corpus proceeding brought by a state capital defendant. Petitioners seek review of the order of the United States Court of Appeals of the Third Circuit dated January 14, 2003, reversing the order of the district court, and granting the writ as to sentencing. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28 U.S.C. § 2254(d), which provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;...

STATEMENT OF THE CASE

This petition presents yet another stage of litigation for one of the most notorious murderers in Pennsylvania history. His guilt has never been in doubt. On September 25, 1982, George Banks murdered thirteen people in an armed rampage in Wilkes-Barre, Pennsylvania. Seven of his victims were children, including five of his own. Banks admitted the killings in several statements to police. At trial, he took the stand and admitted shooting most of the victims; however, Banks claimed that the police had framed him for

the *other* murders, which the police themselves had supposedly committed.

On June 21, 1983, a Luzerne County jury rejected Banks' fanciful conspiracy theory and convicted him on twelve counts of first-degree murder, and one count each of third-degree murder, attempted murder, aggravated assault, recklessly endangering another person, robbery, and theft of a motor vehicle. Following the penalty phase of the trial, the same jury sentenced Banks to death on each of the twelve counts of first-degree murder. He received an additional aggregate sentence of twenty-five to fifty years in prison on the other convictions.

Afterwards began an odyssey of appeals and collateral review that has now lasted almost two decades. The Pennsylvania Supreme Court first affirmed Banks' conviction on direct appeal in 1987, see Commonwealth v. Banks, 521 A.2d 1 (Pa. 1987), and this Court denied *certiorari*, see Banks v. Pennsylvania, 484 U.S. 873 (1987). Banks then sought collateral relief under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541 *et seq*. One of the claims raised in this first PCRA petition is at issue here: Banks claimed for the first time that his sentencing instructions violated Mills v. Maryland, 486 U.S. 367 (1988). The PCRA trial court rejected this argument, as well as Banks' other claims. This denial of collateral relief was affirmed by the Pennsylvania Supreme Court. Commonwealth v. Banks, 656 A.2d 467 (1995). This Court again denied *certiorari*. Banks v. Pennsylvania, 516 U.S. 835 (1995).

Banks' first federal habeas petition was dismissed without prejudice so that Banks could pursue additional state

remedies. Banks v. Horn, 126 F.3d 206 (3d Cir. 1997). The state courts, however, found that Banks' second PCRA petition was time-barred under the 1996 amendments to the PCRA. Commonwealth v. Banks, 726 A.2d 374 (Pa. 1999). Governor Thomas Ridge signed a death warrant -- Banks' second -- on March 9, 1999; petitioner returned once again to federal court. This time, the district court denied the petition on the merits. Banks v. Horn, 63 F. Supp.2d 525 (M.D. Pa. 1999), App. 129-176, *reconsideration denied*, App. 121-128.

On appeal, the Third Circuit reversed and granted Banks a new sentencing hearing based on the Mills claim. 271 F.3d 527 (3d Cir., Oct. 31, 2001), App. 72-120. The panel refused to consider whether Mills could properly be applied retroactively to older convictions like this one, because the state court had not addressed the retroactivity issue. App. 98-104. After rehearing was denied, this Court granted the Commonwealth's Petition for Writ of *Certiorari*, and simultaneously issued a *per curiam* opinion reversing the judgment. The Court explained that federal habeas courts *must* decide the retroactivity question when properly raised by the state, and directed the Third Circuit to do so. App. 62-68. This Court also noted that the Federal Circuits are split on the question of whether Mills is retroactive. App. 66 & n.4.

Both parties filed supplemental briefs in the Court of Appeals on the retroactivity question, and several months later the Third Circuit issued its latest opinion, holding that Mills did not create a new rule and therefore can be retroactively applied to this case. App. 1-38. Two judges joined the opinion of the court; the third member of the panel, the Honorable Delores K. Sloviter, filed a separate concurring opinion. Judge Sloviter opined that Mills was

indeed a new rule, and normally it should not be retroactively applied under Teague v. Lane, 489 U.S. 288 (1989). Nevertheless, despite this Court's clear instruction that Teague *must* be applied when properly raised by the state, Judge Sloviter wrote that Teague should *not* be applied where, as here, the state courts have reached the merits of the underlying claim. App. 39-57.

REASONS FOR GRANTING THE WRIT

I. The Circuits have split over the question of whether *Mills v. Maryland* announced a new rule of law that cannot be retroactively applied; this Court should grant *certiorari* to resolve the issue.

The Third Circuit granted sentencing relief to Banks based on an alleged violation of Mills v. Maryland, 486 U.S. 367 (1988). The problem is that Banks' judgment became final in 1986, before Mills was decided. This Court has explained that new rules of constitutional law generally cannot be retroactively applied. See Teague v. Lane, 489 U.S. 288 (1989) (announcing rule of non-retroactivity). After first refusing to consider the question, the Third Circuit has now held that Mills did not announce a new rule, and therefore it does not implicate the rule against retroactivity. This decision has deepened an already existing Circuit split.

This Court already noted the split when it remanded this case last year. App. 66 & n.4. Compare Miller v. Lockhart, 65 F.3d 676, 685-86 (8th Cir. 1995) (Mills announced new rule of law that, per Teague, could not be applied retroactively on collateral review), and Cordova v. Collins, 953 F.2d 167, 173 (5th Cir.) (same), cert. denied, 502

U.S. 1067 (1992), with Gall v. Parker, 231 F.3d 265, 322 (6th Cir. 2000) (Mills did not announce new rule of constitutional law so as to bar retroactive application under Teague), cert. denied, 121 S. Ct. 2577 (2001), and Williams v. Dixon, 961 F.2d 448, 456 (4th Cir. 1992) (although Mills announced new rule, it qualifies under second Teague exception permitting retroactive application), cert. denied, 506 U.S. 991 (1992). Similarly, state courts have come to differing conclusions on the Mills/Teague issue. Compare Commonwealth v. Cross, 726 A.2d 333, 338 n.4 (Pa. 1999) (Mills not retroactive under Teague) with State v. Zuniga, 444 S.E.2d 443, 446-47 (N.C. 1994) (Mills properly applied retroactively).

These cases demonstrate a deep uncertainty, not only about the retroactive application of Mills, but also about the proper application of Teague in general. The courts cannot agree on what makes a rule "new" so as to trigger the rule of non-retroactivity, or what makes a rule so fundamental as to overcome the Teague bar. Even the three Third Circuit judges who decided this case were unable to agree on a theory of Mills retroactivity. Compare Opinion of the Court (Rendell, J., with Roth, J.) (Mills not new rule under Teague) (App. 1-38), with Concurring Opinion (Sloviter, J.) (Mills is a new rule that usually should not be applied retroactively, but where the state courts address the merits of the Mills issue by relaxing their rules of waiver on collateral review, no Teague analysis is necessary) (App. 39-57).

The Mills/Teague issue is a critically important Circuit split. Even now, years after Mills was decided, older capital cases raising questions of Mills retroactivity continue to find their way to the federal courts. See, e.g., Brown v. Lee, 319 F.3d 162, 168 (4th Cir. 2003) (notes that Fourth Circuit has decided that Mills applies retroactively; remands

for consideration of Mills claim after finding procedural bar inadequate). Here in Pennsylvania, this question is especially important. The jury instructions at issue in this case were standard in this Commonwealth for years -- as the state Attorney General noted in his *amicus* brief before the Third Circuit, the panel's merits decision "will directly impact at least thirty cases" currently making their way through the state and federal courts. App. 178. In many of these cases, the Attorney General explained, the judgments were final before Mills was decided, and so the question of retroactivity is directly at issue. App. 179-180 & n.4.

The Attorney General's prediction is coming true: The federal courts in this Circuit have, through their Mills analysis of this once-standard instruction, effectively nullified every death penalty imposed in Pennsylvania before approximately 1989. See Henry v. Horn, 218 F. Supp.2d 671, 686-90 (E.D. Pa. 2002); Peterkin v. Horn, 179 F. Supp.2d 518, 522 (E.D. Pa. 2002); Laird v. Horn, 159 F. Supp.2d 58, 107-108 (E.D. Pa. 2001); Abu-Jamal v. Horn, 2001 WL 1609690, *114-126 (E.D. Pa. 2001). See also Hackett v. Price, 212 F. Supp.2d 382, 403-411 (E.D. Pa. 2001) (decided before Third Circuit issued Banks opinion; granted relief on Mills challenge to similar instructions; currently pending on appeal); Holloway v. Horn, 161 F. Supp.2d 452, 579-80 (E.D. Pa. 2001) (denying Mills challenge to similar instructions; Third Circuit granted certificate of appealability on Mills issue, appeal currently pending); Holland v. Horn, 150 F. Supp.2d 706, 756-62 (E.D. Pa. 2001) (denying relief on Mills issue; petition for certificate of appealability pending in Third Circuit). Many more cases await decision. See, e.g., Yarris v. Horn, 230 F. Supp.2d 577, 590-91 (E.D. Pa. 2002) (finding Mills issue reviewable despite Yarris's failure to abide by state deadline

for collateral review; court will decide issue in subsequent decision).

1. Mills announced a new rule.

The Mills/Teague inquiry depends, first, on whether Mills announced a new rule of law: that is, whether its holding was "dictated by precedent" existing at the time that Banks' conviction became final. Teague, 489 U.S. at 301. The "new rule" requirement is designed to prevent second-guessing of "reasonable, good faith interpretations of existing precedents made by state courts." Teague, 494 U.S. at 414; see also Gilmore v. Taylor, 508 U.S. 333, 339-40 (1993). If the state court's decision was reasonable in light of then-current law, it should be respected; only where the state court ignored *clear* precedent that *dictated* the contrary result, should its conclusions be re-visited. See also O'Dell v. Netherland, 521 U.S. 151, 164-66 (1997) (rule is new, even when foreshadowed by prior precedent, if it was susceptible to debate among reasonable jurists); Sawyer v. Smith, 497 U.S. 227, 234-36 (1990) (purpose of Teague is to prevent disruption of final judgments by "gradual developments in the law," which should be viewed as "new").

Under this standard, the Mills rule was new – its holding was by no means a foregone conclusion in 1987, and indeed it marked a significant leap from prior precedent. This Court first held in Lockett v. Ohio, 438 U.S. 586, 604 (1978), that a capital sentencer must be allowed to consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Although Lockett was a plurality opinion, this Court applied its holding several times over the next few years. In each

case, the Court reversed a death sentence where the sentencer had been *entirely precluded* from considering a category of appropriate mitigating evidence. First, in Eddings v. Oklahoma, 455 U.S. 104, 114 (1982), the Court invalidated a death sentence where the sentencing judge had stated that he could not consider the defendants' family background in mitigation "as a matter of law." Similarly, in Skipper v. South Carolina, 476 U.S. 1, 3 (1986), the jury had not been permitted to consider any evidence concerning the defendant's adjustment to prison. Finally, in Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987), neither the advisory jury nor the sentencing judge was permitted to consider evidence supporting non-statutory mitigating circumstances; thus, the evidence of the defendant's family background was ignored.

That was where the law stood at the time that Banks' conviction became final. Mills, decided the following year, addressed a different problem -- the question of unanimity. There was no dispute that the jurors in Mills could hear and consider any evidence of mitigation that the defendant chose to present. See Md. Ann. Code, Art. 27, §413(g) (allowing sentencer to find as mitigation "[a]ny other facts which the jury or the court ... finds as mitigating circumstances in the case"), quoted in Mills, 486 U.S. at 370 n.1. If, after having considered all of the evidence, the jurors unanimously agreed on the presence of a particular mitigating factor, then they could embark on a second step -- namely, weighing that mitigator against any aggravating circumstances proved by the state beyond a reasonable doubt. If the jury considered and *rejected* that mitigating evidence, that is, if the jurors could not unanimously agree that a particular mitigating factor was present, then that mitigating factor could not be part of the second-step weighing process.

The Mills rule thus goes beyond the principle that the jury must be allowed to consider mitigating evidence; Mills commands that *every* juror be allowed to consider *every* piece of potentially mitigating evidence at *every* point in the deliberative process. In doing so, Mills invalidated a state rule requiring juror unanimity -- the kind of rule that had once been entirely left to the states. See McKoy v. North Carolina, 494 U.S. 433, 467 (1990) (Scalia, J., dissenting) (noting that, before Mills, Court had never before invalidated a jury-unanimity requirement). Indeed, as the dissent in McKoy also noted, this Court had previously *approved* unanimity requirements in similar contexts. See Martin v. Ohio, 480 U.S. 228 (1987) (approving unanimity requirement as condition to establishing self-defense in capital murder case); Patterson v. New York, 432 U.S. 197 (1977) (as condition to establishing defense of extreme emotional disturbance in murder case); Rivera v. Delaware, 429 U.S. 877 (1976) (as condition to establishing defense of insanity in murder case).

While Lockett, Eddings, Skipper and Hitchcock certainly informed the Mills decision, those earlier cases did not make the Mills rule inevitable. Saffle v. Parks, 494 U.S. 484, 490 (1990) (Lockett and Eddings "do not speak directly, if at all, to ... *how* [the jury] must consider the mitigating evidence," as opposed to "*what* mitigating evidence the jury must be permitted to consider in making its sentencing decision.") (emphasis in original). In fact, at least four present Justices on this Court dispute that the outcome in Mills was even "controlled or governed" by Lockett and Eddings, let alone dictated by those earlier decisions. See McKoy, 494 U.S. at 452-56 (Kennedy, J., concurring); id. at

471 (Scalia, J., dissenting, with Rehnquist, C.J., and O'Connor, J.).

The Third Circuit's attempts to justify its "new rule" holding are remarkably weak. The panel reviewed Lockett, Eddings, Skipper, and Hitchcock, as well as several other of this Court's decisions, and concluded that "the result in Mills was obvious," App. 37, and indeed "no reasonable jurist could have reached a different result." App. 24.[1] This is

[1] The panel also found that the result in Mills had been dictated by three other cases – but none of these presented remotely the same issue. In Woodson v. North Carolina, 428 U.S. 280 (1976), the Court held that the Eighth Amendment is violated by laws imposing a mandatory death penalty for broad categories of crimes, that is, where the sentencer is not allowed to consider any mitigating evidence at all. In California v. Brown, 479 U.S. 538 (1987), the Court approved an instruction to the sentencing jury not to base its verdict on "mere sympathy." 479 U.S. at 542. Finally, in Andres v. United States, 333 U.S. 740 (1948), a direct appeal of a federal criminal conviction, the Court interpreted a federal statute to require juror unanimity as a prerequisite to imposing the death penalty. 333 U.S. at 748-49. None of these cases suggest that Mills was inevitable.

Indeed, the Mills instructions could easily have been approved as a way to reconcile "the two central principles of our Eighth Amendment jurisprudence" described by these cases. Brown, 479 U.S. at 544 (O'Connor, J., concurring). On the one hand, this Court has warned against blanket exclusions of evidence relevant to mitigation; to that end, the Maryland scheme allowed consideration of all such evidence presented by the defendant. On the other hand, this Court has said that

(continued ...)

plainly untrue, as the dissent in McKoy makes clear. The earlier cases required that death penalty sentencers be allowed to consider all relevant mitigating evidence; they did not address the Mills issue of whether the states may create a capital sentencing scheme where *every* juror is free to consider *all* evidence presented in mitigation, but may weigh only those mitigators that are unanimously found. The Third Circuit also observed that Mills "is replete with references to controlling precedent," as if such references only occur in run-of-the-mill applications of old law. This Court has already rejected such a simplistic analysis. See O'Dell, 521 U.S. at 161 n.2 (Court's statement in Simmons v. South Carolina that its decision was "compel[led]" by earlier decisions, did not mean that rule was not "new"; "courts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions") (quotation omitted).

To be "dictated" by prior precedent, a rule must be logically *necessary* from the cases preceding it; where there is doubt, comity demands that state courts be given the benefit of that doubt, and their "good faith" decisions should be validated. Under this standard, Mills was clearly new.

unbridled juror discretion is also improper – so rather than allow the verdict to be controlled by one juror who sees mitigation where all others do not, the Mills instructions require unanimity. Mills eventually disapproved of this scheme, but its result does not mean this was not a good-faith attempt by Maryland to comply with complex death penalty jurisprudence.

2. The Mills rule does not qualify for retroactive application under one of the exceptions to Teague.

Because the Third Circuit found that Mills did not announce a new rule, it went no further in its Teague analysis. If this Court should find, however, that the Mills rule was indeed new, then the second Teague question must be answered – whether Mills nevertheless qualifies for retroactive application under one of the exceptions to Teague.

There are two such exceptions, but only one of these might be applicable to Mills. This is the so-called "second Teague exception;" as this Court has explained, "[a] rule that qualifies under this exception must ... 'alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding." Sawyer v. Smith, 497 U.S. 227, 242 (1990), quoting Teague, 489 U.S. at 311. By way of example, this Court has cited the rule of Gideon v. Wainwright, 372 U.S. 335 (1963) -- announcing the right of criminal defendants to be represented by counsel -- as the sort of "bedrock procedural element" that would qualify for retroactive application. Saffle, 494 U.S. at 495. The Court has also explained that this exception is "best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus -- that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods." Teague, 489 U.S. at 313.

On the other hand, this Court has also warned that the second Teague exception will be rare in application: "Whatever the precise scope of this exception, it is clearly meant to apply only to a small core of rules requiring

observance of those procedures that ... are implicit in the concept of ordered liberty." Graham v. Collins, 506 U.S. 461, 478 (1993) (internal quotations omitted). See also Teague, 489 U.S. at 313 ("we believe it unlikely that many such components of basic due process have yet to emerge."). Thus, this Court has held that a variety of new rules do not meet the second Teague exception. See, e.g., O'Dell v. Netherland, 521 U.S. 151, 167 (1997) (rule of Simmons v. South Carolina, requiring that jury be instructed of defendant's parole-ineligibility if prosecution argues that he poses a future danger, not a watershed rule under Teague); Lambrix v. Singletary, 520 U.S. 518, 539-40 (1997) (rule of Espinosa v. Florida, that if judge in "weighing" state is required to give weight to jury's sentencing recommendation then neither judge nor jury can consider invalid aggravating circumstance, does not qualify for second Teague exception); Graham, 506 U.S. at 478 (proposed new rule requiring special jury instruction concerning mitigating evidence would not qualify for Teague exception); Sawyer, 497 U.S. at 241-44 (rule of Caldwell v. Mississippi, that Constitution prohibits imposition of death sentence where sentencer has been led to believe that ultimate responsibility for determining appropriateness of punishment lies elsewhere, not "watershed rule" under Teague.)

The Mills rule does not meet this standard. It did not change the substance of what a capital jury must be allowed to consider – that had already been done, by Lockett and succeeding cases. Rather, Mills requires states to allow consideration of mitigating evidence in a later phase of deliberations, that is, when the jury determines the consequences of its having found aggravating circumstances. In other words, Mills regulates not *what* the jury can consider, but *how* it can consider it. This is not the sort of

bedrock procedural element that is equivalent to bars against a runaway mob, a prosecutor bent on framing an innocent man, a false confession resulting from torture, or a criminal trial without a defense lawyer.

For the purposes of this petition, the important point is that the Mills/Teague issue should be decided, one way or the other. There is a sharp judicial split of opinion on the issue, and the outcome of many older death penalty cases depends on its resolution. This Court should grant *certiorari* and review this critical question.

II. The Pennsylvania Supreme Court's rejection of the *Mills* claim was reasonable; this Court should grant *certiorari* to clarify the principle that habeas relief is available only where the state court is not only wrong, but also unreasonable.

If Mills is found to be retroactive, there is one more important issue to be resolved here -- the merits. The court below engaged in a textbook misapplication of the AEDPA standard of review when it considered the merits of Banks' Mills claim in its 2001 opinion. The panel explicitly re-instated this analysis in its latest opinion. App. 38. Unfortunately, such disregard of the AEDPA standard remains common among the lower federal courts. This Court should grant review to reaffirm the principle that reasonable state court opinions must be respected.

Earlier this term, this Court re-emphasized that AEDPA means what it says: State court decisions *must* stand unless they are unreasonable. The Court unanimously reversed two Ninth Circuit opinions that had overreached this plain standard. See Woodford v. Visciotti, 123 S. Ct. 357

(November 4, 2002) (California courts' rejection of ineffectiveness claim in capital case was reasonable application of Strickland, despite possible disagreement on the merits), and Early v. Packer, 123 S. Ct. 362 (November 4, 2002) (state court's determination that trial judge's comments were improper was neither contrary to, nor unreasonable application of, federal law).

The Third Circuit similarly overreached here. The panel insisted that it was empowered to exercise its own "independent judgment" in reviewing the Mills claim. App. 100 n.15. The court's citation for this standard, however, was from the *dissent* on this point in Williams v. Taylor, 529 U.S. 362, 389 (2000). The court's determination to apply the wrong standard animates its decision to grant relief.

The trial court instructed the jury as follows, in pertinent part, as quoted by the court below:

> The sentence you impose will depend on your findings concerning aggravating and mitigating circumstances. The Crime Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and *no* mitigating circumstances, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances.
>
> Remember, under the law of this Commonwealth, your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and *no* mitigating circumstance, or if you unanimously find one or more aggravating circumstances which then outweigh any mitigating

circumstances. In all other cases, your verdict would be life imprisonment.

App. 110-111 (emphasis added).

These instructions do not violate Mills; they contain no requirement that the jurors be unanimous as to the presence of a particular mitigating factor before they can consider it. In fact, if the jury follows these instructions -- and this Court must presume they did so -- then there is no constitutional problem. The jury was directed to proceed in several predictable stages. First, if the jurors unanimously agree that one or more aggravating circumstances have been proved, and they also unanimously agree that no mitigating factors are present, then they must return a sentence of death. If they are not unanimous with respect to the absence of mitigating factors -- that is, if *any* of them believe that one or more mitigating circumstances are present -- the jurors move to the second phase: in other words, if they are unanimous as to the presence of a particular aggravator, then they must weigh this aggravator against "any mitigating circumstances." This is entirely proper, and it does not violate Mills.

The premise of the panel's decision is that the jury could have misunderstood the instructions to mean something they did not say: that the last phrase quoted above, "any mitigating circumstances," might have meant "any *unanimously found* mitigating circumstances," thus leading the jury to ignore any mitigating circumstance that was not "*unanimously found*." But this critical phrase is not there. The instruction, by its plain language, did not impose a unanimity requirement on the consideration of mitigators. The Third Circuit's decision is simply based on speculation that confusion was a *possibility*.

According to the court below, no jurist could reasonably uphold these instructions in the face of a Mills challenge. This is truly a remarkable conclusion, because the Third Circuit has *itself* upheld similar instructions. A decade ago, before the national debate on the death penalty had reached its present intensity, a different Third Circuit panel rejected the theory that the jurors were reasonably likely to understand a comparable jury charge to require unanimity as to mitigating factors. See Zettlemoyer v. Fulcomer, 923 F.2d 284, 308 (3d Cir.), cert. denied, 502 U.S. 902 (1991). The instructions at issue in Zettlemoyer are set out in the margin;[2] even a cursory reading reveals this charge to be nearly identical to the instructions at issue here -- the once-standard

[2] The trial court in Zettlemoyer issued a similar instruction:

> ... If you find that aggravating circumstance [that the murder victim was a prosecution witness] and find no mitigating circumstances *or if you find that the aggravating circumstance which I mentioned to you outweighs any mitigating circumstance you find*, your verdict must be the death penalty.
>
> * * *
>
> ... Under the law, as I said, you are obligated by your oath of office to fix the penalty at death *if you unanimously agree and find beyond a reasonable doubt that there is an aggravating circumstances [sic] and either no mitigating circumstance or that the aggravating circumstance outweighs any mitigating circumstances.*

923 F.2d at 307-308 (emphasis added).

Pennsylvania instructions. The state courts, therefore, could safely assume that the Third Circuit had approved this charge.

Six years later, in Frey v. Fulcomer, 132 F.3d 916 (3d Cir. 1997), cert. denied, 524 U.S. 911 (1998), something changed. As a matter of English structure, the instruction in Frey was the same as the Zettlemoyer instruction; but the panel nevertheless found a way to distinguish the earlier case. The Frey panel employed a "sound bite" analysis, essentially requiring the reviewing court to count the number of words that come between the terms "unanimous" and "mitigating" in any given jury charge. 132 F.3d at 923. In Frey, the panel found the instruction to fail the "sound bite" test, because the words were too close together -- their respective phrases were separated by seven words, rather than the longer seventeen word separation in Zettlemoyer. 132 F.3d at 923.

Whatever the merits of the "sound bite" analysis, it is far from obvious. See Abdur'rahman v. Bell, 226 F.3d 696, 712 (6th Cir. 2000) (rejecting claim that proximity of terms "unanimous" and "mitigating circumstances" could have led to jury confusion), cert. denied, 122 S. Ct. 386 (2001). In fact, even in Frey, the panel recognized that the Commonwealth's contrary analysis was "plausible." 132 F.3d at 924. But now, the panel in this case has gone much further. Frey is no longer merely the supposedly better interpretation of two plausible alternatives – now, according to the Third Circuit, it is the only reasonable conclusion. This cannot be squared with Frey's "plausible" language – let alone with AEDPA's deference provision.

The panel, in its 2001 merits decision, did not discuss Zettlemoyer, or even acknowledge that an earlier Third

Circuit panel had decided a similar case in a contrary way.[3] This is unfair to the state courts. The message is implicit but clear: The panel's decision conflicts with Zettlemoyer, and yet when the state court follows Zettlemoyer-style analysis it is the state court that is "unreasonable."[4] See Abu-Jamal, 2001 WL 1609690 at *120, 126 (despite "linguistically similar" charge in Zettlemoyer, court "compelled to conclude" that relief is required by Banks and Frey).

The Third Circuit's current analysis is wrong. First of all, the panel applied the wrong standard by which to measure jury instructions. While it used to be appropriate to reject jury instructions that *might* be misunderstood, that is no longer the proper test. In Boyde v. California, 494 U.S.

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[3] The only passing mention of Zettlemoyer in the panel's 2001 opinion appears in a lengthy block quote from Frey; Zettlemoyer is never specifically identified or explained, and no citation is given. App. 113. In its 2003 opinion, the panel cites Zettlemoyer only to note that the Mills retroactivity question was not decided in that case. App. 9 n.3.

[4] The Pennsylvania Supreme Court has repeatedly noted its agreement with Zettlemoyer and its disagreement with Frey. See Commonwealth v. Chester, 733 A.2d 1242, 1256 n.14 (Pa. 1999) (citing Zettlemoyer in rejecting Mills claim; court also observes that Frey failed to apply Teague rule to bar retroactive application of Mills); Commonwealth v. Laird, 726 A.2d 346, 359 n. 12 (Pa. 1999) (same); Commonwealth v. Breakiron , 729 A.2d 1088, 1097 n.7 (Pa. 1999) (noting disagreement with Frey), cert. denied, 528 U.S. 1169 (2000); Cross , 726 A.2d at 337-38 (same; in the alternative, Mills should not apply retroactively).

370 (1990), this Court specifically rejected evaluative inquiries which primarily emphasized the *possibility* of juror confusion, that is, whether reasonable jurors "*could have*" been confused, or whether there was "*a substantial possibility*" that the jury was confused. Id. at 379. The Court in Boyde also rejected standards based on the mere possibility that a *single juror* was misled, rather than the jury as a whole. The Court adopted a more deferential and reliable test: "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." 494 U.S. at 380. This carefully reformulated standard requires a more significant showing on the claimant's part in order to demonstrate a constitutional violation, as this Court explicitly recognized. See id. ("a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a *possibility* of such an inhibition") (emphasis added); see id. at 387 (Marshall, J., dissenting) ("the majority's reasonable likelihood standard *is not met* where a reasonable juror *could* or *might* have interpreted a challenged instruction unconstitutionally") (emphasis added, internal quotation marks omitted).

Here, the Third Circuit repeatedly invoked a pre-Boyde standard. The panel asked whether the jury "*could have*" interpreted the instructions improperly; the panel also re-introduced the single juror standard, asking whether "*a reasonable juror could* so conclude." App. 112, 116 (emphasis added). This standard is more lenient, with respect to the showing the claimant must make, than the law permits. The panel also cited the correct Boyde formulation, id. at 109, but failed to consistently apply it -- the pre-Boyde standard is repeated again and again. See App. 106 ("the critical question is ... whether a reasonable jury *could have*

interpreted the instructions in an unconstitutional manner") (emphasis added), App. 109 (same), App. 112 (it is "quite possible" that instructions had been interpreted improperly).

The source of the panel's confusion is Mills itself. Mills was decided before Boyde, and in Boyde this Court specifically noted that the Mills opinion offers several improper formulations of the instructional standard: for example, whether jurors "could have" been confused, or whether there was a "substantial possibility" of confusion. Boyde, 494 U.S. at 378. But these standards are no longer correct, and so the Third Circuit was wrong to use them. The underlying issue here, properly framed, is whether the jury instructions, measured by the Boyde standard, raised a reasonable probability that the jury would misunderstand the instructions so as to violate Mills.

Under AEDPA, of course, there is an additional layer of deference: The question for the federal habeas court is not whether the state court was wrong, but whether its decision was at least reasonable. It surely was. The Pennsylvania Supreme Court noted that the instructions "mirror[] the language found in the death penalty statute of our Sentencing Code" and observed that it had upheld substantively identical instructions in Commonwealth v. Hackett, 627 A.2d 719 (Pa. 1993), Commonwealth v. Marshall, 633 A.2d 1100 (Pa. 1993), and Commonwealth v. O'Shea, 567 A.2d 1023 (Pa. 1989), cert. denied, 498 U.S. 881 (1990). The Court had earlier explained that this language did not require jury unanimity with respect to the *presence* of mitigating circumstances, but only regarding the *absence* of mitigating circumstances. Hackett, 627 A.2d at 725. Thus, even if a single juror believed that a particular mitigating circumstance

was present, he or she could weigh it against any aggravating circumstance the prosecution might prove. Id.

The Third Circuit also criticized the Pennsylvania Supreme Court for analyzing the instructions as written, rather than in their likely impact on a jury. App. 109. But that is not a fair criticism. The state supreme court simply noted that the instructions were identical to the language of the Pennsylvania death penalty statute, and observed that it had rejected challenges to similar instructions many times. 656 A.2d at 470. The Court then cited some of these earlier decisions. Id., citing Hackett, 627 A.2d 719, Marshall, 633 A.2d 1100, and O'Shea, 567 A.2d 1023. All of these earlier cases in turn cite Commonwealth v. Frey, 554 A.2d 27 (Pa. 1989), in which the Court had first applied Mills to the standard instructions in greater depth; the Court in Frey had concluded that "individual jurors were free to weigh whatever mitigating circumstances they perceived..." 554 A.2d at 31. It cannot be seriously contended that the state court was obligated to restate the analysis of its earlier decisions over and over again. Yet that is the thrust of the panel's decision.

None of the other circumstances of this case render the state court's decision unreasonable. The panel believed that the verdict slip, on which the jury recorded its decision, somehow increased the possibility of confusion -- but the slip's language exactly tracked the oral instructions. App. 116-118. If anything, the slip *reduced* the possibility of juror confusion. The whole point of the Third Circuit's analysis in Frey, and adopted by the panel in this case, is that, when the jurors *heard* the words "unanimous" and "mitigating" in one "sound-bite," they might have become confused. If the same words are *written down*, however, this is no longer a danger.

On the contrary, where written instructions are at issue, the only question is whether the instructions are ambiguous as a matter of grammatical structure or language. But as a matter of grammar and language, the instructions in this case are identical to the instructions in Zettlemoyer, which the Third Circuit approved a decade ago. Thus, the existence of written instructions renders the state court decision *more* reasonable, not less.[5]

That the Pennsylvania Supreme Court's decision was at least reasonable is also clear from a review of other federal decisions. Many other circuits have rejected Mills challenges to similar instructions and verdict sheets. See, e.g., Scott v. Mitchell, 209 F.3d 854, 874 (6th Cir), cert. denied, 531 U.S. 1021 (2000) (no Mills issue where jurors told "all 12 of you must sign [the verdict form] ... [i]t must be unanimous"); Coe v. Bell, 161 F.3d 320, 338 (6th Cir. 1998), cert. denied, 528 U.S. 842 (1999) (instruction that jury must unanimously find aggravating circumstances are not outweighed by any mitigating circumstances does not violate Mills); Parker v. Norris, 64 F.3d 1178, 1187 (8th Cir. 1995), cert. denied, 516 U.S. 1095 (1996) (that verdict form "failed to inform jurors

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[5] In state court, Banks also claimed that the polling of the jury had created the possibility of juror confusion. 656 A.2d at 470-71. At the end of the trial, Banks requested that the jury be polled; the trial court asked each juror whether he or she agreed with the verdict. In doing so, the court repeated some of the same language used in the instructions and the verdict slip. The Third Circuit agreed with the state court, however, that this jury polling had not made the possibility of juror confusion more likely. App. 119.

that they could consider non-unanimous mitigating circumstances" did not violate Mills); Smith v. Dixon, 14 F.3d 956, 982 n.15 (4th Cir.) (*en banc*), cert. denied, 513 U.S. 841 (1994) (no Mills error where jury required to write "Yes" on the verdict form beside each mitigating circumstance "for which the defendant has satisfied you"); Griffin v. Delo, 33 F.3d 895, 905-906 (8th Cir. 1994), cert. denied, 514 U.S. 1119 (1995) (instruction that jury must unanimously find that any mitigating circumstances outweighed aggravating circumstances did not imply that jury must be unanimous in finding a mitigating circumstance); Lawson v. Dixon, 3 F.3d 743, 754 (4th Cir. 1993), cert. denied, 114 S.Ct. 1208 (1994) (same: court charged that jury must unanimously find that aggravating circumstance or circumstances outweighed "any" mitigating circumstances found); Maynard v. Dixon, 943 F.2d 407, 420 (4th Cir. 1991), cert. denied, 502 U.S. 1110 (1992) (instruction "impose[d] a unanimity requirement on aggravating circumstances and the other elements of the death sentence deliberations, but not ... as to the mitigating circumstances"); Kordenbrock v. Scroggy, 919 F.2d 1091, 1120 (6th Cir. 1990) (*en banc*) (nine of thirteen judges on *en banc* panel rejected Mills claim because there was no express unanimity requirement as to mitigation, and "it cannot be reasonably inferred that silence as to finding a mitigating factor would likely cause the jury to assume that unanimity was also a requirement"), cert. denied, 499 U.S. 970 (1991).

All of these courts have come to the same conclusion: If an instruction requires unanimity in one step of the sentencing process, that does not mean that the jury is likely to be confused about the other steps. The instructions here pass the Boyde test, as the Pennsylvania Supreme Court concluded. This represents -- at the very least -- a reasonable application of Mills.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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Supreme Court, U.S.
FILED

02-1603 APR 14 2003

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; JAMES PRICE, Superintendent of State Correctional Institution at Greene; RAYMOND J. COLLERAN, Superintendent of State Correctional Insitution at Waymart; COMMONWEALTH OF PENNSYLVANIA,
Petitioners,

v.

GEORGE E. BANKS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 99-9005

GEORGE E. BANKS,
Appellant

v.

MARTIN HORN, Commissioner, PA Dept of Corrections; JAMES PRICE, Superintendent of State Correctional Institute Greene; RAYMOND J. COLLERAN, Superintendent State Correctional Institute Waymart; COMMONWEALTH OF PENNSYLVANIA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 99-cv-00438)
District Judge: Honorable James F. McClure, Jr.

Argued April 2, 2001 and
On Remand from the United States Supreme Court
by Order of June 17, 2002
Before: SLOVITER, ROTH and RENDELL, *Circuit Judges*

JUDGMENT

This case having been heard on the record from the United States District Court for the Middle District of Pennsylvania, and having been remanded to this Court by order of the United States Supreme Court dated June 17, 2002, it is now here

ORDERED and ADJUDGED by this Court that Banks's sentence, as set forth in the Order of the District Court entered on September 16, 1999, be and the same is hereby VACATED and the case is REMANDED with directions to grant a provisional writ of habeas corpus directing resentencing. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/
Marcia M. Waldron, Clerk

Dated: January 14, 2003

PRECEDENTIAL

Filed January 14, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 99-9005

GEORGE E. BANKS,
Appellant

v.

MARTIN HORN, Commissioner, PA Dept of Corrections; JAMES PRICE, Superintendent of State Correctional Institute Greene; RAYMOND J. COLLERAN, Superintendent State Correctional Institute Waymart; COMMONWEALTH OF PENNSYLVANIA

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Argued April 2, 2001 and
On Remand from the United States Supreme Court
by Order of June 17, 2002

Before: SLOVITER, ROTH and RENDELL, Circuit Judges

(Filed: January 14, 2003)

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OPINION OF THE COURT

RENDELL, Circuit Judge:

In *Horn v. Banks*, 122 S. Ct. 2147 (2002), the United States Supreme Court directed us to analyze whether *Mills v. Maryland*, 486 U.S. 367 (1988), could be retroactively applied under the principles articulated in *Teague v. Lane*, 489 U.S. 288 (1989), for purposes of our collateral review of George Banks's conviction and sentence. As a result, the Court reversed that portion of our opinion in *Banks v. Horn*, 271 F.3d 527 (3d Cir. 2001), dealing with *Teague*. We now conclude that *Mills* did not announce a new rule of constitutional law for retroactivity purposes, and thus that our analysis and resolution of Banks's *Mills* claims was proper. Accordingly, we will endorse the reasoning set forth in the remainder of our prior opinion.

I.

George Banks was sentenced to death for the murder of thirteen people in Wilkes-Barre, Pennsylvania, in 1982. His conviction and sentence were upheld by the Supreme Court of Pennsylvania on direct appeal, *Commonwealth v. Banks*, 521 A.2d 1 (Pa. 1987), and on appeal for state post-conviction relief. *Commonwealth v. Banks*, 656 A.2d 467 (Pa. 1995). Banks then sought a writ of habeas corpus in the Middle District of Pennsylvania, which was denied in August of 1999. *Banks v. Horn*, 63 F. Supp. 2d 525 (M.D. Pa. 1999).

On October 31, 2001, we reversed the District Court and granted Banks a provisional writ of habeas corpus, finding meritorious Banks's argument that his death sentence was unconstitutional. *Banks v. Horn*, 271 F.3d 527 (3d Cir. 2001) ("Banks I"). Specifically, we found that the sentencing phase instructions and forms violated *Mills v. Maryland*, 486 U.S. 367 (1988). In *Mills*, the United States Supreme Court reversed a death sentence where there was a substantial probability that a reasonable jury could have understood the sentencing instructions and forms to disallow the consideration of mitigating factors not unanimously found to exist. *Id.* at 384. In *Banks I*, we concluded that based on the language of the instructions and verdict slip employed in Banks's penalty phase, a reasonable possibility existed that the jurors believed they were precluded from considering mitigating evidence they had not found unanimously. *Banks I*, 271 F.3d at 547-551.

In reaching that conclusion, we were presented with the question of whether *Mills* was applicable for purposes of our collateral review of Banks's conviction and sentence under *Teague v. Lane*, 489 U.S. 288 (1989). In *Teague*, the Supreme Court revolutionized the structure for analyzing the retroactivity of criminal procedure decisions, holding that, with rare exception, prisoners may not rely on "new rules" -- essentially, rules not settled by pre-existing precedent -- for purposes of federal habeas corpus review. *Id.* at 299-301. *Teague* thus directed that new decisions of constitutional criminal procedure that are favorable to a prisoner are usually inapplicable once the prisoner has fully exhausted her direct appeals, including the filing of a writ of certiorari to the United States Supreme Court. *Id.*

Teague's new rule of nonretroactivity was premised at least in part on a respect for the workings of state courts and

state judges appropriate to our federal system. In particular, the Supreme Court has noted that by validating "reasonable, good-faith interpretations of existing precedents made by state courts," the principles of nonretroactivity established in *Teague* "effectuate[] the States' interest in the finality of criminal convictions and foster[] comity between federal and state courts." *Gilmore v. Taylor*, 508 U.S. 333, 340 (1993); *see also Teague*, 489 U.S. at 308.

Because Banks's conviction became final in October of 1987,[1] eight months before the Supreme Court issued its decision in *Mills*, one of the Commonwealth's primary arguments before us in *Banks I* was that *Mills* was not applicable to Banks's petition for habeas relief. We disagreed. We reasoned that, although *Teague* "retroactivity is a 'threshold question,'" *Banks I*, 271 F.3d at 541 (quoting *Teague*, 489 U.S. at 300), because the Pennsylvania Supreme Court decision itself applied *Mills* (albeit doing so unreasonably), neither *Teague*, nor its underlying purposes, required us to perform a retroactivity analysis of *Mills*. *Banks I*, 271 F.3d at 541-43. Instead, we found it necessary only to review the merits of the Pennsylvania Supreme Court's decision, concluding:

> *Teague* teaches that the federal courts in habeas corpus proceedings should be reluctant to apply new rules of federal jurisprudence in state court cases

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[1] A conviction becomes final for *Teague* purposes "when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). Banks's conviction was therefore final when the Supreme Court denied certiorari on October 5, 1987. *Banks v. Pennsylvania*, 484 U.S. 873 (1987).

> decided before such new rules were handed down. Principles of comity and finality counsel that we maintain a circumscribed scope of habeas review. Here, however, . . . the Pennsylvania Supreme Court applied *Mills*. We are examining the application of *Mills*, not because we wish to impose a new rule not considered by the Pennsylvania Supreme Court, but as the court in fact *did* consider and apply it. In such a situation, *Teague* is not implicated. Accordingly, we need ask only whether the Pennsylvania Supreme Court's application of *Mills* should be disturbed under [the appropriate standard of review].

Id. at 543 (citations omitted). Accordingly, we held that resolution of the retroactivity of *Mills* under *Teague* was unnecessary, and proceeded directly to our examination of the merits of the Pennsylvania Supreme Court's application of *Mills* to the facts presented in Banks's appeal. As noted above, we resolved that question in Banks's favor, holding that the sentencing phase jury instructions and forms were clearly unconstitutional, and therefore that the Pennsylvania Supreme Court's decision finding otherwise involved an unreasonable application of established Supreme Court precedent. *Id.* at 551.

In *Horn v. Banks*, 122 S. Ct. 2147, 2148 (2002) ("Banks II"), the Supreme Court concluded otherwise, explicitly and emphatically holding that "federal courts must address the *Teague* question when it is properly argued by the government." In doing so, the Court focused on its statements in *Caspari v. Bohlen*, 510 U.S. 383 (1994), that *Teague*'s "nonretroactivity principle *prevents* a federal court from granting habeas corpus relief to a state prisoner based on a" new rule, and thus that "if the State . . . argue[s] that the defendant seeks the benefit of a new rule of constitutional

law, the court must apply *Teague* before considering the merits of the claim." *Id.* at 389 (emphasis in original). Applying these principles, the Supreme Court found that it was "incumbent upon" us to "perform a *Teague* analysis before granting respondent relief under *Mills*," and that we "erred in concluding that [we] did `not need to focus on anything other than the reasoning and determination of the Pennsylvania Supreme Court.'" *Banks II*, 122 S. Ct. at 2150 (quoting *Banks I*, 271 F.3d at 541). Accordingly, the Supreme Court "reverse[d] [our] holding that `*Teague* is not implicated' by this case, and remand[ed] for further proceedings consistent with" its decision. *Banks II*, 122 S. Ct. at 2151 (quoting *Banks I*, 271 F.3d at 543).[2]

II.

We note at the outset that our determination as to the merits of Banks's *Mills* claim was not reviewed by the Supreme Court. The Court thus did not vacate our previous decision but only reversed that portion of our opinion that concluded that a *Teague* analysis was unnecessary for our review of Banks's habeas petition. Accordingly, the sole issue presently before us is whether our application of *Mills* on habeas review of Banks's sentence was improper under the Supreme Court's nonretroactivity jurisprudence.[3] To

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[2] On July 12, 2002, Banks filed a Petition for Rehearing. The Supreme Court recalled its issuance of judgment on July 17, but on August 26, the Court denied rehearing and reissued judgment.

[3] This is not the first time we have been presented with the issue of the retroactivity of *Mills*. In *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 306 n.19 (3d Cir. 1991), we "decided to reach the

(Continued)

provide background for the analysis, we first briefly discuss the Court's decision in *Mills* itself, then turn to an examination of the Supreme Court's retroactivity framework.

A.

In *Mills*, the Court considered the constitutionality of a set of jury instructions, as well as the implementing verdict forms, that could be understood to prevent the consideration of mitigating circumstances if the jury was not unanimous in finding the existence of such circumstances. *Mills*, 486 U.S. at 371. That is, "even if some or all of the jurors were to believe *some* mitigating circumstance or circumstances were present, unless they could unanimously agree on the existence of the same mitigating factor, the sentence necessarily would be death."[4] *Id.* (emphasis in original). The Court cited the following two possibilities as constitutionally problematic:

(Continued)

merits of the *Mills* claim . . . [but] did not expressly hold whether *Mills* falls outside the *Teague* bar." *Frey v. Fulcomer*, 132 F.3d 916, 920 n.4 (3d Cir. 1997). In *Frey*, we noted the issue but did not reach it because the Commonwealth failed to raise it, and we deemed it waived. *Id.*

[4] The Maryland Court of Appeals upheld the sentence of death. *See Mills v. State*, 527 A.2d 3 (1987). Although it agreed that "if the statute and form were read as petitioner suggested, jurors *would be* improperly prevented from giving due consideration to mitigating evidence," *see Mills*, 486 U.S. at 372 (emphasis in original), the Court of Appeals adopted a construction of the statute exonerating it from the potential constitutional issue. *See Mills*, 527 A.2d at 12-17.

> If eleven jurors agree that there are six mitigating circumstances, the result is that no mitigating circumstance is found. Consequently, there is nothing to weigh against any aggravating circumstance found and the judgment is death even though eleven jurors think the death penalty wholly inappropriate. . . .
>
> [In] a situation just as intuitively disturbing: All 12 jurors might agree that some mitigating circumstances were present, and even that those mitigating circumstances were significant enough to outweigh any aggravating circumstance found to exist. But unless all 12 could agree that the same mitigating circumstance was present, they would never be permitted to engage in the weighing process or any deliberation on the appropriateness of the death penalty.

Id. at 373-74 (citations omitted). Noting that imposition of the death penalty under such circumstances would "be the height of arbitrariness," *id.* at 374, it went on to state:

> It is beyond dispute that in a capital case *the sentencer* may not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. The corollary that *the sentencer* may not refuse to consider *or be precluded from considering* any relevant mitigating evidence is equally well established.

Id. at 374-75 (first and third emphasis added) (quotations and citations omitted). The Court then reiterated the constitutional problem at hand: "[I]f petitioner is correct, a jury that

does not unanimously agree on the existence of any mitigating circumstance may not give mitigating evidence any effect whatsoever, and must impose the sentence of death." *Id.* at 375. The Court stated that its existing jurisprudence prohibited any "barrier to the sentencer's consideration of all mitigating evidence. . . . [w]hatever [its] cause." *Id.* As the Court found a "substantial probability" that reasonable jurors would have understood themselves as being precluded from considering mitigating evidence not found unanimously, the Court reversed Mills's sentence of death, concluding: "Under our cases, the sentencer must be permitted to consider all mitigating evidence. The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk." *Id.* at 384.

B.

Again, the sole issue before us is whether the rule enunciated in *Mills* is retroactively applicable to Banks's appeal. Retroactivity analysis is governed by the principles first articulated in *Teague v. Lane*, in which the Supreme Court held that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 489 U.S. at 310. Application of this principle of retroactivity proceeds in three steps. *See, e.g., Caspari*, 510 U.S. at 390. First, we must determine when the defendant's conviction became final. *Id.* Second, we must survey the legal landscape to determine whether or not the case in question announced a new rule of constitutional law. *Id.* Finally, if we determine that the case did announce a new rule, we must consider whether it fits into one of the two exceptions to nonretroactivity. *Id.* Those exceptions are reserved for (1) rules that

"place[] a class of private conduct beyond the power of the State to proscribe, . . . or address[] a substantive categorical guarantee accorded by the Constitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense," or (2) "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 494-95 (1990) (citations and internal quotations omitted). Because the exceptions find rather narrow applicability, however, the typically dispositive step in the *Teague* retroactivity analysis is the determination of whether the implicated constitutional principle qualifies as a "new rule."

In *Teague* itself, the Court admitted that it is "often difficult to determine" whether a case announces a new rule, and explicitly avoided any "attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes." *Teague*, 489 U.S. at 301. The Supreme Court has further recognized that the inquiry is particularly difficult where the decision in question merely extended the reasoning of prior cases. *See, e.g., Saffle*, 494 U.S. at 488; *Graham v. Collins*, 506 U.S. 461, 467 (1993); *Butler v. McKellar*, 494 U.S. 407, 412-13 (1990); *see also Mackey v. United States*, 401 U.S. 667, 695 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) (noting the "inevitable difficulties" in distinguishing new rules from the application of old rules in analogous cases).

Perhaps as a result of the inevitable difficulty in articulating one test to govern all possible retroactivity scenarios, the Supreme Court has "stated variously the formula for determining when a rule is new." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997). Under the Court's original explication in *Teague*, "a case announces a new rule when it

breaks new ground or *imposes a new obligation* on the States or the Federal Government." *Teague*, 489 U.S. at 301 (emphasis added). "To put it differently," the *Teague* Court explained, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* (emphasis in original); *see also, e.g., Graham*, 506 U.S. at 467 ("A holding constitutes a new rule within the meaning of *Teague* if it breaks new ground, imposes a new obligation on the States or the Federal Government, or was not *dictated* by precedent existing at the time the defendant's conviction became final." (quotations omitted) (emphasis in original)). Similarly, the Court has stated that previous precedents must not simply "inform, or even control or govern" the analysis, but instead must "compel the rule" sought by the defendant. *Saffle*, 494 U.S. at 491; *see also Butler*, 494 U.S. at 415 (noting that it is insufficient that a decision was considered to be controlled or governed by prior opinions).

At the same time, the Court has focused on the decision-making process confronting state court judges. *See, e.g., O'Dell*, 521 U.S. at 156 ("At bottom, . . . the *Teague* doctrine `validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.'" (quoting *Butler*, 494 U.S. at 414)); *Graham*, 506 U.S. at 467; *Teague*, 489 U.S. at 308. And, in recent decisions, the Court has approached the inquiry from the standpoint of a "reasonable jurist." In *Lambrix v. Singletary*, 520 U.S. 518 (1997), for instance, the Court asked whether the "unlawfulness of [the defendant's] conviction was apparent to all reasonable jurists." *Id.* at 527-28; *see also id.* at 531 (examining whether a "reasonable jurist . . . could have reached a conclusion different from" the one ultimately reached by the Supreme Court); *id.* at 526 (stating that our inquiry is to "determine whether a state court

considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution" (quotations omitted)); *O'Dell*, 521 U.S. at 166 ("*Teague* asks state court judges to judge reasonably, not presciently."). In sum, "unless reasonable jurists hearing petitioner's claim at the time his conviction became final `would have felt compelled by existing precedent' to rule in his favor, we are barred from doing so now." *Graham*, 506 U.S. at 467 (quoting *Saffle*, 494 U.S. at 488).

III.

We hold that *Mills* did not announce a new rule of constitutional law for retroactivity purposes, and accordingly that our application of Mills on our habeas review of Banks's sentence was completely proper.[5] There are four aspects to our reasoning: (1) the legal landscape at the time of Banks's conviction, (2) the Supreme Court's decision in *Mills* itself,

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[5] Because we conclude that *Mills* did not announce a new rule under *Teague*, we need not address Banks's arguments regarding whether *Mills* falls within one of the two exceptions to nonretroactivity. We note, however, that in *Williams v. Dixon*, 961 F.2d 448, 454-56 (4th Cir. 1992), the Court of Appeals for the Fourth Circuit held that *Teague* does not bar application of *Mills* (and *McKoy v. North Carolina*, 494 U.S. 433 (1990)) on habeas because they are "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Graham*, 506 U.S. at 478 (quotations omitted); *see also Gall v. Parker*, 231 F.3d 265, 323 (6th Cir. 2000) (holding that *Mills* did not announce a new rule under *Teague* but also finding that, even if Mills did announce a new rule, it falls within the second *Teague* exception); *Jermyn v. Horn*, No. 97-634, 1998 WL 754567, at *36-39 (M.D. Pa. Oct. 27, 1998) (holding that *Mills* is a new rule but falls within the second *Teague* exception).

(3) the relevant post-*Mills* decisions of the Supreme Court, and (4) the opinions of our sister Courts of Appeals who have addressed whether *Teague* bars retroactive application of *Mills*.

Our "first and principal task" under *Teague* is to survey the legal landscape to determine whether *Mills* "was dictated by then existing precedent . . . that is, [whether] the unlawfulness [of the situation in *Mills*] was apparent to all reasonable jurists." *Lambrix*, 520 U.S. at 527-28. As discussed above, in *Mills* the Supreme Court reversed a sentence of death where there was "a substantial probability that reasonable jurors, upon receiving the judge's instructions in th[e] case, and in attempting to complete the verdict form as instructed, . . . thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of " any particular circumstance. *Mills*, 486 U.S. at 384. We find highly persuasive Banks's argument that, given the legal landscape, *Mills* represented merely an application of the well established constitutional rule that the Eighth Amendment prohibits all barriers to the sentencer's consideration of any and all mitigation evidence in the penalty phase of a capital trial.

By the time Banks's conviction became final in 1987, the legal landscape was primarily defined by Supreme Court case law spanning nearly a dozen years.[6] We begin our

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[6] It is worth noting that although the Supreme Court has instructed that "the reasonable views of state courts are entitled to consideration" as part of the legal landscape, *Caspari v. Bohlen*, 510 U.S. 383, 395 (1994), both parties have focused exclusively on Supreme Court precedent. At any rate, we believe that here the Supreme Court's case law adequately depicts the legal landscape at the time of Banks's conviction.

examination of this precedent with the Supreme Court's decision in *Woodson v. North Carolina*, 428 U.S. 280 (1976), which struck down North Carolina's mandatory death penalty statute. Of the many constitutional flaws the plurality found in North Carolina's capital sentencing structure,[7] one particularly notable defect was its "failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Woodson*, 428 U.S. at 303; *see also Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1977) (striking down Louisiana's mandatory death penalty statute). The plurality reiterated that death as a penalty is distinguishable in kind from all other penalties, and held that "the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304 (citations omitted); *see also Roberts*, 428 U.S. at 333-34 (plurality opinion) (noting that the Constitution requires a "focus on the circumstances of the particular offense and the character and propensities of the offender"); *Jurek v. Texas*, 428 U.S. 262, 271 (1976) (plurality opinion) (stating that the Eighth and Fourteenth Amendments require that the sentencer be allowed to consider mitigating circumstances).

The Court articulated the full import of *Woodson*'s constitutional directive more clearly in *Lockett v. Ohio*, 438

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[7] The Court's opinion in *Woodson* was a plurality of three -- Justices Powell, Stevens, and Stewart. Justices Brennan and Marshall both concurred in the judgment given their opinion that capital punishment inherently violates the Eighth and Fourteenth Amendments.

U.S. 586 (1978), in which it struck down a statute that restricted the range of mitigating factors that could be considered by a jury.[8] Whereas *Woodson* involved a statute precluding any consideration of mitigating evidence, *Lockett* involved somewhat more complex questions: "which facets of an offender or his offense [are] relevant in capital sentencing," and "what degree of consideration of relevant facets" does the Constitution require. *Id.* at 604. The Court responded, in expansive language, that:

> [T]he Eighth and Fourteenth Amendments require that *the sentencer* . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. (first emphasis added). The Court explained that:

> Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. . . . .
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> There is no perfect procedure for deciding in which cases governmental authority should be used to

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[8] *Lockett*'s plurality opinion was written by Chief Justice Burger and joined by Justices Powell, Stevens, and Stewart. Justice Brennan took no part in the case, and Justice Marshall again concurred on the ground that capital punishment is always unconstitutional.

> impose death. But a *statute that prevents the sentencer in all capital cases from giving independent mitigating weight* to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Id. at 605 (emphasis added). In *Lockett*, the Court stated in unequivocal terms that to "meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." Id. at 608.

Four years later, in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the constitutional rule articulated in *Lockett* was first adopted and applied by a majority of the Court. In *Eddings*, the statute in question allowed defendants to present evidence of any mitigating circumstance-- unlike the statute at issue in *Lockett* -- but the trial judge found that he was unable to consider certain mitigating evidence as a matter of law. *Id.* at 113. The Supreme Court reversed, describing *Lockett* as requiring that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor," *id.* at 112, and holding that:

> The limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, *neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.* In this instance, it was as if the trial judge had

> instructed the jury to disregard the mitigating evidence proffered on his behalf. The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Id. at 113-115 (emphasis added). Thus, in *Eddings*, the *Lockett* plurality's constitutional rule was solidified as a settled and prominent feature of the Supreme Court's death penalty jurisprudence; indeed, the Court thereafter characterized the rule as one of the two prerequisites to a valid death sentence imposed by the Eighth Amendment. *See California v. Brown*, 479 U.S. 538, 541 (1987); *see also Penry v. Lynaugh*, 492 U.S. 302, 318 (1989) (stating that by early 1986 "it was clear from *Lockett* and *Eddings*" that the Constitution prohibited a State from "prevent[ing] the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty"). The legal landscape at the time of Banks's conviction, however, was further shaped by three additional cases in which the Court had occasion to apply the *Lockett/Eddings* rule.

First, in *Skipper v. South Carolina*, 476 U.S. 1 (1986), the Supreme Court relied on *Lockett* and *Eddings* to reverse the defendant's death sentence after the trial judge ruled that certain mitigating evidence was inadmissible and prohibited the sentencing jury from considering it. The Court began by reiterating its "well established" *Lockett/Eddings* rule, stating:

> There is no disputing that . . . in capital cases the sentencer may not be precluded from considering, as a mitigating factor, any aspect of a defendant's

> character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering any mitigating evidence.

Id. at 4 (quotations and citations omitted). The Court then addressed the sole question before it: "whether the exclusion from the sentencing hearing of the testimony petitioner proffered . . . deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment." *Id.* Noting that it could "hardly be disputed" that the exclusion did have that effect, *id.*, the Court concluded that "[t]he exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." *Id.* at 8.

A year later, in *California v. Brown*, 479 U.S. 538 (1987), the Court again affirmed the constitutional principles established in *Lockett* and *Eddings*, but this time upheld the underlying death sentence.[9] In *Brown*, the defendant challenged the constitutionality of "an instruction informing jurors that they `must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.'" *Brown*, 479 U.S. at 540. The Court began by reiterating that the Eighth Amendment requires that capital defendants be allowed to introduce any relevant mitigating evidence, and further that consideration of such evidence

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[9] The Supreme Court has made clear that *Brown* was not dictated by *Lockett* and *Eddings*. *See Saffle*, 494 U.S. at 494. Nonetheless, the decision constitutes part of the legal landscape prior to Banks's conviction becoming final.

is a "`constitutionally indispensable part of the process of inflicting the penalty of death.'" *Brown*, 479 U.S. at 541 (quoting *Woodson*, 428 U.S. at 304). Applying these principles to the instruction before them, however, the Court found that it merely "prohibit[ed] juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the trial," limitations fully consistent with the Constitution's requirement that the jury be allowed to consider any *mitigating* evidence. *Brown*, 479 U.S. at 543; *see also Saffle*, 494 U.S. at 488-95 (holding that *Teague* precluded the defendant's constitutional challenge to a jury instruction requiring jurors to avoid the influence of sympathy in sentencing).

Finally, in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the Supreme Court unanimously reversed the defendant's death sentence where an "advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances." *Id.* at 398-99. The Court held that such a circumstance "did not comport with the requirements of *Skipper*, *Eddings*, and *Lockett*," *id.* at 399 (citations omitted), which established that "the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." *Id.* at 394 (quotations omitted). The Court concluded, "[O]ur cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid." *Id.* at 399; *see also Burger v. Kemp*, 483 U.S. 776, 790 n.7 (1987) (affirming, in dicta, the constitutional principles established in *Lockett* and *Eddings*); *Sumner v. Shuman*, 483 U.S. 66, 75-76 (1987) (same).

Although Banks relies primarily on the *Lockett/Eddings* line of cases, we mention another Supreme Court case, *Andres v. United States*, 333 U.S. 740 (1948), that was

cited in *Mills* and relied on by another Court of Appeals in deciding this issue. *See Mills*, 486 U.S. at 377 & n.9; *Gall v. Parker*, 231 F.3d 265, 323 (6th Cir. 2001). *Andres* involved an assessment and interpretation of a federal death penalty statute, and the question of whether a trial court's unanimity instructions pursuant to that statute were erroneous. *Id.* at 746. The statutory scheme was structured such that the finding of guilt meant the automatic imposition of the death penalty unless the verdict was qualified by the phrase "without capital punishment." *Id.* The government argued that the jury's determination as to guilt was conclusive as to the death penalty unless the jury then unanimously decided to qualify the verdict. *Id.* The Supreme Court opined, however, that the proper construction required that the "jury's decision upon both guilt and whether the punishment of death should be imposed must be unanimous." *Id.* at 749. That is, the Court required that the jury consider and be unanimous that death *should* be the penalty imposed. Although it recognized that "the interpretation .. . urged by the Government cannot be proven erroneous with certainty," the Court found its construction "more consonant with the general humanitarian purpose of the statute and the history of the Anglo-American jury system." *Id.* at 748-49. The Court then held that the instruction given to the jury by the District Court conveyed the erroneous interpretation of the statute. *Id.* at 749-52. Under the instructions given, the Court concluded, the jury might have erroneously but "reasonably conclude[d] that, if they [could not] all agree to grant mercy, the verdict of guilt must stand unqualified." *Id.* at 752. Accordingly, the Court overturned the sentence and ordered a new trial. *Id.*

Clearly, the *Andres* decision took place within a different statutory context and, in our view, is not a model of clarity. However, because it, like *Mills*, involved jury instructions on unanimity in a capital case, *Andres* certainly

plays some role in the relevant legal landscape -- a conclusion reinforced by the Court's citation to it in *Mills* itself. *See Mills*, 486 U.S. at 377 & n.9. At the very least, *Andres* invokes a number of themes that, significantly, are consistent with and complimentary to the Court's later constitutional death penalty jurisprudence. For instance, *Andres* indicates a concern for particular clarity in capital jury instructions, noting that doubts "should be resolved in favor of the accused." *Andres*, 333 U.S. at 752; *see also Mills*, 486 U.S. at 377. Further, it is particularly noteworthy that the upshot of the Court's decision was that the statute and jury instructions were interpreted to avoid a situation in which a juror could be prevented -- by operation of a requirement for unanimity to avoid the death penalty, and, accordingly, by the views of other jurors -- from giving effect to his or her belief that death was an inappropriate sentence under particular circumstances. *Andres*, 333 U.S. at 748-52.

We agree with Banks that this legal landscape -- as exemplified by *Lockett* and *Eddings*, but also including at least *Andres*, *Woodson*, *Skipper*, *Brown*, and *Hitchcock* -- strongly supports Banks's position that the Court in *Mills* did not develop any new principle of law, but instead merely relied upon clear and well established constitutional rules, such that *Mills* was compelled and dictated by the legal landscape, and no reasonable jurist could have reached a different result. Insofar as the landscape evidenced the Supreme Court's unwavering recognition and insistence that the Eighth Amendment prohibits any barrier to the sentencer's consideration of mitigating evidence, it provided a clear indication that a jury instruction that could work to prevent a juror from considering any and all mitigating evidence, whether because of unanimity requirements or otherwise, would be constitutionally infirm.

In reaching this conclusion, we are not unmindful of the difficulty of employing *Teague*'s mandates to divine whether the legal landscape supports a finding that a rule is or is not new, given the Court's various formulations of the measuring stick for determining whether a particular case does or does not announce a new rule. It is not precisely clear just how short the "step" must be between existing precedent and the current announcement, or how strong the pull of precedent must be in a certain direction. There certainly must be some gradation or difference, or the rule in question would not be even arguably new. Thus, a decision that does extend reasoning may nonetheless be viewed as not "new" under *Teague*. The Supreme Court has acknowledged as much when it has noted the difficulty of determining whether a new rule was announced where "a decision extends the reasoning of our prior cases." *Saffle*, 494 U.S. 488; *see also Graham*, 506 U.S. at 467; *Butler*, 494 U.S. at 412-13. To read certain of the operative terms the Court has employed, such as "dictated" and "commanded," narrowly, such that they would require express direction from the existing precedent, would be to unrealistically require courts to have anticipated all future scenarios in order for later cases to not announce a new rule. Another term the Court has used, "compel," has been defined as to "force, drive, [or] impel." *Webster's Third New Int'l Dictionary* 463 (1993). This seems not only to be a more functional description of the test, but it also fits nicely with the concept of the "reasonable jurist" that is referenced in many of the Court's recent cases in this area. That is, we ask whether the existing precedent set forth a rule that all reasonable jurists would agree impels or drives the result in the new situation presented. Here, the existing case law clearly provided that sentencers could not be prevented from considering any and all mitigating evidence. In *Mills*, the Court merely recognized that the perceived need for unanimity could constitute one such

unconstitutional barrier. Even if one were to question whether the result was "dictated" or "commanded" by the constitutional rule itself, it surely was compelled in the sense that previous pronouncements would constrain all reasonable jurists to conclude the situation in *Mills* to be unconstitutional. It is perhaps this shading that distinguishes our view of *Mills* from that of our concurring colleague.[10]

The Supreme Court's reasoning and rhetoric in *Mills* itself follows form from the legal landscape, and bolsters the view that it was not announcing a new constitutional rule. Initially, we note that "[i]t is significant" that *Mills* did explicitly and heavily rely on controlling precedent. *Lambrix*, 520 U.S. at 528. Unlike the situation in *Lambrix*, in which the Supreme Court found a "new rule" in part because the underlying decision cited only a single case -- and with a "cf." signal at that, *see id.* at 528-29 -- *Mills* is replete with references to controlling precedent; the Court frequently cited to and quoted from *Lockett*, *Eddings*, *Skipper*, and *Hitchcock*. *See Mills*, 486 U.S. at 374-76. Moreover, the Court used language in its analysis that does not merely state, but indeed exhorts, the rich precedent compelling its reasoning and result. The Court's precise wording bears repeating here:

> It would certainly be the height of arbitrariness to allow or require the imposition of the death penalty under the circumstances . . . postulated by petitioner. . . . It is beyond dispute that in a capital case "`the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of

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10 In her concurrence, Judge Sloviter focuses on whether *Mills* was "commanded" or "dictated" by the legal landscape in concluding that it announced a new rule.

> the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S. Ct. 869, 874, 71 L.Ed.2d 1 (1982), quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964-2965, 57 L.Ed.2d 973 (1978) (plurality opinion) (emphasis in original). *See Skipper v. South Carolina*, 476 U.S. 1, 4, 106 S. Ct. 1669, 1670-1671, 90 L.Ed.2d 1 (1986). The corollary that "the sentencer may not refuse to consider or be precluded from considering `any relevant mitigating evidence'" is equally "well established." *Ibid.* (emphasis added), quoting *Eddings*, 455 U.S., at 114, 102 S. Ct., at 877.
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> . . . .
>
> Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, *Lockett v. Ohio*, supra; *Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821, 95 L.Ed.2d 347 (1987); by the sentencing court, *Eddings v. Oklahoma*, supra; or by an evidentiary ruling, *Skipper v. South Carolina*, supra. The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. Whatever the cause, if petitioner's interpretation of the sentencing process is correct, the conclusion would necessarily be the same: "Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing." *Eddings v. Oklahoma*, 455 U.S., at 117, n., 102 S. Ct., at 878, n. (O'Connor, J., concurring).

> The critical question, then, is whether petitioner's interpretation of the sentencing process is one a reasonable jury could have drawn from the instructions given by the trial judge and from the verdict form employed in this case.

Mills, 486 U.S. at 374-76. Given this language, it can hardly be disputed that *Mills* did not announce a new rule.[11] As the Court recognized, it was well established by the *Lockett/Eddings* line of cases that the Constitution prohibited any barrier to the jury's consideration of mitigating evidence, "[w]hatever the cause." *Id.* at 375. The relevant cases had never indicated that the source or form some particular barrier took would be relevant to its constitutionality; instead they had consistently and repeatedly prohibited, in clear language, *any* barrier. *See, e.g., Hitchcock*, 481 U.S. at 394 ("[I]n capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." (quotations omitted)); *Skipper*, 476 U.S. at 4 (same); *see also, e.g., Saffle*, 494 U.S. at 491 ("*Lockett* and *Eddings* command that the State must allow the jury to give effect to mitigating evidence in making the sentencing decision."). The extent of the relevant holding in *Mills*, then, was merely its acknowledgment of a conclusion already required by the governing constitutional rules: that if a jury instruction and verdict form, because of its unanimity requirements, precluded juror consideration of any and all mitigation evidence, the resulting death sentence would be

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[11] Although it has been noted that for *Teague* purposes an opinion's language is not always "conclusive," *see, e.g., Butler*, 494 U.S. at 415, we nonetheless find the Court's rhetoric and reasoning in *Mills* to be unique -- providing extensive "evidence tending to prove" that *Mills* did not announce a new rule. *O'Dell*, 521 U.S. at 161 n.2.

unconstitutional. *See McKoy v. North Carolina*, 494 U.S. 433, 438 (1990) ("[A]llowing a `holdout' juror to prevent the other jurors from considering mitigating evidence violated the principle established in *Lockett v. Ohio*, that a sentencer may not be precluded from giving effect to all mitigating evidence." (citation omitted)). That these constitutional principles were settled before *Mills* is further evidenced by the Maryland Court of Appeals decision reversed by the Supreme Court in *Mills* itself, as the disagreement between the Court of Appeals' majority and dissenting opinions was unrelated to the underlying constitutional rules that govern capital sentencing. *See Mills*, 527 A.2d at 13; *id.* at 33 (McAuliffe, J., dissenting) ("[T]he majority and I are in essential agreement as to the basic principles of law that control in a capital sentencing proceeding. . . . A mitigating circumstance . . . must be considered by each juror who believes it to have been proven to exist, irrespective of whether all jurors agree that it exists."); *Mills*, 486 U.S. at 372 ("The [Maryland Court of Appeals] did not dispute that if the statute and form were read as petitioner suggested, jurors *would* be improperly prevented from giving due consideration to mitigating evidence." (emphasis in original)); see also Butler, 494 U.S. at 415 (indicating that actual disagreement on a constitutional rule provides some evidence that it is "new" under *Teague*).

Moreover, we note that recent Supreme Court references to the *Teague* test have indicated that the "determinative question" under *Teague* is whether reasonable jurists, reading the case law in existence at the time the conviction became final, could have concluded that Banks's sentencing "was *not* constitutionally infirm." *Graham*, 506 U.S. at 477 (emphasis in original); *see also id.* at 476 ("The result in a given case is not dictated by precedent if it is susceptible to debate among reasonable minds, or, put differently, if

reasonable jurists may disagree." (quoting *Stringer v. Black*, 503 U.S. 222, 238 (1992) (Souter, J., dissenting)). Given the Supreme Court's reliance on the *Lockett/Eddings* rule as an established requirement of the Eighth Amendment by the time Banks's conviction became final, we are persuaded that the relevant rule in *Mills* was "apparent," and that no "reasonable jurist" could have reached a different conclusion. *Lambrix*, 520 U.S. at 528; *see also, e.g., Butler*, 494 U.S. at 415 (asking whether the relevant outcome was "susceptible to debate among reasonable minds"). Indeed, as the settled *Lockett/Eddings* rule was a blanket prohibition on barriers to the jury's consideration of mitigating circumstances, we find ourselves unable to construct any analytic framework, consistent with the legal landscape, under which *Mills* could have come out differently. *Cf. Lambrix*, 520 U.S. at 532 ("There were at least three different . . . approaches that would have suggested a different outcome."). A failure to decide *Mills* as the Court in fact decided it would not just have taken an "illogical" or "grudging" application of the *Lockett/Eddings* rule, *Butler*, 494 U.S. at 415, it would have taken a completely untenable one. Any reasonable jurist "would have felt compelled" to decide *Mills* accordingly. *O'Dell*, 521 U.S. at 156 (quoting *Lambrix*, 520 U.S. at 527).

While the Commonwealth and our concurring colleague seize on the fact that there were four dissenting justices in *Mills* in arguing that "reasonable jurists" could have differed on the outcome at the time of that case, a careful reading of the *Mills* dissent makes clear that the dissenting justices did not take issue with the principle that jurors must be able to consider all mitigating factors without the requirement of unanimity. The dissenters never questioned the strong statements by the majority to the effect that the result in *Mills* was mandated by the *Lockett/Eddings* line of cases. Rather, they viewed the majority as having applied the wrong

test as to the *probability* that jurors misunderstood the instructions in the factual setting presented. *See Mills*, 486 U.S. at 394 (Rehnquist, J., dissenting) ("[T]he question is whether a reasonable juror operating under the trial court's instructions would have considered evidence of mitigating circumstances in a constitutional manner.").

Our conclusion finds support in the Supreme Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989). In *Penry*, the Court considered a challenge to the Texas death penalty scheme, which limited the jury's consideration of the appropriate sentence during a capital trial to resolving three "special issues." *Id.* at 311-12. The precise question before the Court was whether the defendant's sentence was unconstitutional "because the jury was not adequately instructed to take into consideration all of his mitigating evidence and because the terms in the Texas special issues were not defined in such a way that the jury could consider and give effect to his mitigating evidence in answering them." *Id.* at 313. Despite *Teague*, the Court reversed the death sentence, finding that the jury instructions and special issues structure did not adequately allow the jury to consider the defendant's mitigating evidence of mental retardation and an abused childhood. The Court stated that *Lockett* and *Eddings*, along with *Jurek v. Texas*, 428 U.S. 262 (1976), "dictated" the rule that "Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to th[e] mitigating evidence in determining whether the death penalty should be imposed." *Penry*, 492 U.S. at 318-19; *see also Graham*, 506 U.S. at 475 (indicating that the *Lockett/Eddings* line of cases prohibit situations in which "relevant mitigating evidence [is] placed beyond the effective reach of the sentencer," and require that the jury must have a "reliable

means of giving mitigating effect to" the mitigating evidence);[12] *Saffle*, 494 U.S. at 491 (same).

In arguing for the nonretroactivity of *Mills*, the Commonwealth invokes two other Supreme Court decisions handed down after *Mills*. First, the Commonwealth relies on the dissenting opinion and one of the concurring opinions in *McKoy v. North Carolina*, 494 U.S. 433 (1990), to argue that reasonable minds could have disagreed on the outcome in *Mills*. *See also Caspari*, 510 U.S. at 395 (noting that conflicting holdings of state and federal courts indicates disagreement among reasonable minds); *Sawyer v Smith*, 497 U.S. 227, 236-37 (1990) (noting that the fact that three justices dissented in a prior case casts doubt on the argument that the holding in that case was compelled by prior precedent); *Miller v. Lockhart*, 65 F.3d 676, 686 (8th Cir. 1995) (citing opinions in *McKoy*). In *McKoy*, the Supreme Court affirmed *Mills* unconditionally and applied it to North Carolina's sentencing scheme, holding that the unanimity scheme there, precisely like the one in *Mills*, unconstitutionally precluded jurors from giving effect to evidence they might believe called for a sentence less than death. *McKoy*, 494 U.S. at 439-440. In the dissenting opinion and one of the concurring opinions, however, four justices in *McKoy*

[12] Unlike our concurring colleague, we do not view *Graham v. Collins* as adding anything of significance to the legal landscape. In *Graham*, the Supreme Court decided that, unlike *Penry* -- in which the Court held that the "special issues" structure did not give the jury a genuine opportunity for consideration of diminished capacity attributes such as mental retardation and an abused childhood -- the"special issues" structure *did* place certain mitigating evidence such as youth, family background and positive character traits within the sentencer's "effective reach." *Graham*, 506 U.S. at 475. Thus, a result in Graham's favor was not dictated by *Penry* and the *Penry* rule could not be given retroactive effect.

expressed some level of disagreement with the proposition that *Mills* was merely an application of the *Lockett/Eddings* rule. *See id.* at 452-457 (Kennedy, J., concurring in the judgment); *id.* at 457-471 (Scalia, J., dissenting). *But see id.* at 445-452 (Blackmun, J., concurring) (stating that in *Mills* "[t]he Court concluded that a rule mandating unanimous agreement before any juror could consider a particular mitigating factor was forbidden by [its] decisions in *Lockett* and *Eddings*" (citations omitted)). Despite the Commonwealth's suggestion otherwise, we are unconvinced that *McKoy* evidences anything but the correctness of our conclusion. The concurring and dissenting opinions in *McKoy* are not controlling authority, and our opinion today is in accord with the Court's majority opinions in both *Mills* and *McKoy*, each of which independently makes clear that *Mills* was premised on a straight-forward application of settled constitutional precedent.[13]

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[13] Moreover, to the extent the Commonwealth relies on the *McKoy* minority's view that *Mills* was not actually decided on *Lockett/Eddings* grounds, we are unpersuaded that their argument is particularly relevant. Asking whether *Mills* is retroactive in this case is shorthand for asking whether the rule Banks seeks to have applied on habeas -- that the Constitution prohibits unanimity instructions that preclude jurors from giving proper consideration to proffered mitigating evidence -- was a new rule under *Teague* given the date his conviction became final. It is for similar reasons that, as we discuss below, our decision here is not formally inconsistent with, for instance, the Eighth Circuit's decision in *Miller v. Lockhart*, 65 F.3d 676 (8th Cir. 1995), that *Mills* was a new rule. Our conclusion that *Mills* may be retroactively applied on habeas is essentially an acknowledgment that what Banks seeks (and what *Mills* sought) is a clear application of the *Lockett /Eddings* rule, a constitutional principle well settled prior to his conviction

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Secondly, the Commonwealth places great reliance on the Supreme Court's reasoning in *Saffle v. Parks*, 494 U.S. 484 (1990). In *Saffle*, the Supreme Court upheld a jury instruction that required the jury to "avoid any influence of sympathy" in sentencing, finding that the rule sought by *Saffle*, which was grounded in the principles established in *Lockett* and *Eddings*, was a new rule under *Teague*. *Id.* at 487. According to the Court, "*Lockett* and *Eddings* [did] not speak directly, if at all, to the issue presented" in *Saffle*, "whether the State may instruct the sentencer to render its decision on the evidence without sympathy." *Id.* at 490. In so concluding, the Court noted a distinction between rules relating "to *what* mitigating evidence the jury must be permitted to consider in making its sentencing decision," and those relating "to *how* it must consider the mitigating evidence." *Id.* (emphasis in original). "There is a simple and logical difference," the Court stated, "between rules that govern what factors the jury must be permitted to consider in making its sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Id.* at 490. An anti-sympathy instruction does not preclude the jury from considering any mitigating evidence; it merely instructs them to consider that evidence without recourse to sympathy. *See id.* at 493 ("The State must not cut off full and fair consideration of mitigating evidence; but it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice."). Accordingly, the Court concluded that *Lockett* and *Eddings* do not prohibit such an anti-sympathy instruction. *Id.* at

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becoming final. Thus, it could be argued that it is essentially irrelevant whether or not the rule under inquiry was actually decided in *Mills*.

490-94; *see also Brown*, 479 U.S. at 543 (affirming constitutionality of an anti-sympathy instruction).

The Commonwealth, as well as our concurring colleague, seizes on *Saffle*'s "what" versus "how" distinction as supporting its view that *Mills* was a new rule; in effect, it argues that jury unanimity requirements made unconstitutional by *Mills* are nothing but a rule regarding *how* the jury must consider mitigating evidence, i.e., the jury must consider it unanimously. While perhaps viscerally appealing, upon reflection this linguistic shorthand does not withstand scrutiny. Indeed, we believe that, if anything, *Saffle* supports the conclusion that *Mills* did not announce a new rule. As discussed above, the harm identified in *Mills* by the Supreme Court-- as well as the dissenting opinion in the Maryland Court of Appeals-- was the potential that jurors were precluded from considering any and all mitigating evidence. *See Mills*, 486 U.S. at 375. Quite unlike the anti-sympathy *instruction* considered in *Saffle*, *Mills does* concern the precise harm addressed by the Court in *Lockett* and *Eddings*: Its focus was on *what* -- i.e., any and all -- evidence jurors could consider. Although "unanimously" is clearly an adverb, the meaning of the term "unanimously" as used here does not actually relate to "how" the jury is to view the evidence (as does sympathy). Rather, here unanimity presents a *barrier*, potentially preventing jurors from considering any and all mitigating evidence. To the extent that *Saffle* suggests that such rules are clearly prohibited by *Lockett* and *Eddings*, it lends support to our conclusion here. *See Saffle*, 494 US. at 491 (stating that preventing a jury from "considering, weighing, and giving effect to all of the mitigating evidence . . . . come[s] under the rule of *Lockett* and *Eddings*").

Finally, we note that our conclusion finds additional support in a recent ruling by the Court of Appeals for the

Sixth Circuit. In *Gall v. Parker*, 231 F.3d 265 (6th Cir. 2001), the Sixth Circuit held that application of *Mills* on habeas was not prohibited by *Teague*, both because *Mills* did not announce a new rule and because *Mills* falls within the second of *Teague*'s exceptions to nonretroactivity. With regard to the former conclusion, which is more relevant here, the Sixth Circuit found that *Mills* was "dictated by the *Lockett* rule," and emphasized the language in *Mills* quoted above, in which the Supreme Court made "clear [that] it did nothing more than apply *Lockett* to a new factual situation." *Id.* at 323. The Sixth Circuit also noted the Supreme Court's citation in *Mills* to *Andres v. United States*, 333 U.S. 740 (1948), which the court characterized as "a half-century old death penalty reversal" in which "the Court granted a new trial after finding fault in instructions that `probab[ly]' induced a `reasonable' juror to conclude that unanimity was needed to `qualify' a verdict of guilty in order to preclude a death sentence." *Gall*, 231 F.3d at 323 (quoting *Andres*, 333 U.S. at 752). "Given *Lockett*, *Andres*, and the Court's clear language in *Mills*," the Sixth Circuit concluded that *Mills* did not impose a new constitutional obligation. *Gall*, 231 F.3d at 323.[14]

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[14] Similarly, in an opinion we have previously referred to as "brief but thoughtful," *Frey v. Fulcomer*, 132 F.3d 916, 920 n.4 (3d Cir. 1997), the District of Delaware concluded in 1993 that the "requirement that juries in capital cases be permitted to consider all mitigating factors and aspects of a defendant's character and to give effect to that evidence was firmly established" in *Lockett and Eddings*. *Deshields v. Snyder*, 829 F. Supp. 676, 688 (D. Del. 1993) (quoting *Byrd v. Delo*, 733 F. Supp. 1334 (E.D. Mo. 1990). Accordingly, the court found that *Mills* was "nothing more than a mere extension of then existing precedent to a new factual scenario." *Id.*; *see also, e.g., Hopkinson v. Shillinger*, 781 F. Supp. 737, 742 (D. Wy. 1991) ("The Eighth Amendment [under *Lockett*

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It is worth emphasizing here that Banks's case is far stronger than the one presented to the Sixth Circuit in *Gall*. Whereas Gall's conviction became final in 1981, limiting the legal landscape to primarily the plurality opinion in *Lockett*, Banks' conviction was not final until late in 1987, only months before *Mills* and after the Supreme Court's decisions in *Eddings*, *Skipper*, and *Hitchcock*, in all of which a clear majority of the Court applied the *Lockett* rule and reversed a sentence of death.

In contrast to the Sixth Circuit's decision in *Gall*, two Courts of Appeals have held that *Teague* bars the application of *Mills* on habeas. In *Miller v. Lockhart*, 65 F.3d 676 (8th Cir. 1995), the Eighth Circuit Court of Appeals held that *Mills* announced a new rule, but did so in a case in which, like *Gall*, only *Lockett* had been decided prior to the defendant's conviction becoming final. *Id.* at 685. The question of whether *Mills* was dictated by the plurality opinion in *Lockett* alone may be a close one-- as demonstrated by the contradictory opinions of the Sixth and Eighth Circuits -- but the answer to the question before us is clear. When considering *Lockett* in conjunction with *Eddings*, in which a majority of the Court adopted the rule announced by the *Lockett* plurality, the result in *Mills* was obvious, especially given the Court's continued reliance on and application of the *Lockett* rule, prior to *Mills*, in cases such as *Skipper* and *Hitchcock*.

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and *Eddings*] prohibits barriers to consideration of mitigating evidence whether they result from evidentiary rulings, statute, or jury instructions. Thus, *Mills* and *McKoy* are simply different factual applications of that established principle and are applicable [on habeas].").

The Court of Appeals for the Fifth Circuit has also repeatedly stated that *Mills* announced a new rule under *Teague*. *See Woods v. Johnson*, 75 F.3d 1017, 1036 (5th Cir. 1996); *Nethery v. Collins*, 993 F.2d 1154, 1161-62 (5th Cir. 1993); *Wilcher v. Hargett*, 978 F.2d 872, 877-78 (5th Cir. 1992); *Cordova v. Collins*, 953 F.2d 167, 173 (5th Cir. 1992). However, as we previously noted in *Banks I*, the court has not analyzed or explained its conclusions. *Banks I*, 271 F.3d at 542 n.16. Accordingly, we find little in the Fifth Circuit's decisions to persuade us that our application of *Mills* is prohibited by *Teague*.[15]

IV.

Our previous ruling in this case was reversed by the Supreme Court only insofar as we held it unnecessary to decide whether *Mills* had retroactive application. Because we now hold that our application of *Mills* on habeas review of Banks's sentence was not prohibited by *Teague*, we do not disturb the remainder of our previous opinion, including its discussion and holding with regard to the merits of Banks's *Mills* claim. We merely augment that opinion by essentially replacing its discussion of the *Teague* issue with the analysis here. Accordingly, our judgment requiring a new penalty phase for Banks will remain unchanged.

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[15] We also note that in *McDougall v. Dixon*, 921 F.2d 518, 539 (4th Cir. 1990), the Court of Appeals for the Fourth Circuit indicated in dicta that *Mills* and *McKoy* were new rules under *Teague*. In *Williams v. Dixon*, 961 F.2d 448, 453 n.3 (4th Cir. 1992), however, the court found it unnecessary to consider whether *Mills* and *McKoy* were in fact new rules because it held that they fell within the second *Teague* exception.

SLOVITER, *Circuit Judge, concurring.*

I continue to adhere to the judgment of the court instructing the District Court to grant a provisional writ of habeas corpus directed to the petitioner's penalty phase. However, my response to the issue on which the United States Supreme Court remanded this case to us differs from that of the majority.

I.

In its per curiam opinion remanding this case, *Horn v. Banks*, 536 U.S. 266, 122 S. Ct. 2147 (2002), the Supreme Court directed that we perform an analysis under *Teague v. Lane*, 489 U.S. 288 (1989), as to the retroactive application of *Mills v. Maryland*, 486 U.S. 367 (1988). The Court believed that we had contravened *Caspari v. Bohlen*, 510 U.S. 383 (1994), "in which [the Court] held that federal courts must address the *Teague* question when it is properly argued by the government." *Horn*, 536 U.S. at ___, 122 S. Ct. at 2148. We must therefore, as a threshold issue, address *Teague* which, although a plurality opinion, has since been accepted by the Court as setting forth the standard for retro-activity analysis.

The petitioner in *Teague* sought to challenge the composition of his jury, as the prosecutor had used all 10 of his peremptory challenges to exclude blacks. Teague had argued throughout, without success, that the jury was not a fair cross section. His habeas petition in the Supreme Court sought the benefit of its decision in *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that under the Equal Protection Clause the prosecutor had the burden to give a race-neutral explanation for its use of peremptory challenges to exclude black persons from the petit jury). The Court had previously

held in *Allen v. Hardy*, 478 U.S. 255 (1986) (per curiam), that *Batson*, which overruled a portion of *Swain v. Alabama*, 380 U.S. 202 (1965), could not be applied to a case on collateral review because *Batson* constituted an "`explicit and substantial break with prior precedent.'" *Teague* at 295 (quoting *Allen*, 478 U.S. at 258). Teague's second contention in the Supreme Court, that he established a violation of the Equal Protection Clause under *Swain*, was procedurally barred because Teague never presented that claim to the state courts.

Thus, the Court turned to Teague's fair cross section claim, where he relied on the holding in *Taylor v. Louisiana*, 419 U.S. 522 (1975), that the Sixth Amendment required that the jury venire be drawn from a fair cross section of the community. Teague sought to apply the holding in *Taylor* to the composition of the petit jury. In holding that acceptance of Teague's claim would constitute a new rule that it would not apply retroactively to cases on collateral review, the Supreme Court reformulated the standard previously enunciated in *Linkletter v. Walker*, 381 U.S. 618 (1965), and enunciated the principle that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 489 U.S. at 310. The Court explained that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Id.* at 309.

As to the definition of a "new rule," the Supreme Court explained in *Teague* that "[i]n general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government."

Id. at 301. It continued, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* The Court recognized two exceptions to its rule of non-retroactivity, both derived from Justice Harlan's opinion in *Mackey v. United States*, 401 U.S. 667, 675 (1971) (opinion concurring in judgments in part and dissenting in part). The first is for a rule that places "`certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Id.* at 311 (quoting Mackey, 401 U.S. at 692). The second exception is for "watershed rules of criminal procedure." *Id.*

In the Supreme Court's opinion in *Caspari*, the Court elaborated on the responsibility of a federal court faced with a habeas petition seeking relief based on a rule announced after the defendant's conviction became final. *Caspari*, 510 U.S. at 390. The court must survey "the legal landscape" as it existed on the date the defendant's conviction became final and then determine if "a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." *Id.* (citations omitted). If the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the non-retroactivity principle. *Id.*

The rule on which Banks relies is that enunciated in *Mills*. In *Mills*, the Supreme Court vacated a death sentence where the sentencing court's instruction left a substantial probability that the jurors may have believed they had to be unanimous on the existence of a particular mitigating factor before it could be weighed against an aggravating factor in

determining whether the death sentence should be imposed. 486 U.S. at 375-76, 384.

Banks contends that in 1987, at the conclusion of his direct review in state court, the Supreme Court had decided numerous cases creating the framework upon which *Mills* was predicated, and that therefore *Mills* should not be regarded as a new rule for purposes of non-retroactivity under *Teague*. Banks argues that by the time his sentences became final as defined under *Teague* and *Caspari*, the Supreme Court had decided ten cases before *Mills* that "embody the Eighth Amendment prohibition against a state mandated process that creates a barrier to juror consideration of indispensable evidence of the character and record of an offender in a death penalty proceeding." Appellant's Supp. Br. at 3. He counts among those cases *Furman v. Georgia*, 408 U.S. 238 (1972) (invalidating procedures that created a substantial risk that death penalty would be imposed in an arbitrary and capricious manner), and, surprisingly, the three cases after *Furman* that sustained the imposition of death sentences, *Jurek v. Texas*, 428 U.S. 262 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); and *Proffitt v. Florida*, 428 U.S. 242 (1976). Banks' argument is that although the death sentencing schemes were held constitutional in all three cases, the respective schemes allowed the sentencer to consider the defendant's evidence of mitigating circumstances.

Banks states that in *Woodson v. North Carolina*, 428 U.S. 280 (1976), where sentences of death were overturned because the jurors were prevented from considering all mitigating circumstances, the Supreme Court "recognized the constitutional requirement of an `individualized sentencing' in capital cases." Appellant's Supp. Br. at 4. The *Woodson* plurality gave three reasons for its holding: the state statute at issue imposed a mandatory death sentence for certain

offenses; it provided no standards to guide the jury in determining which offenders should be sentenced to death; and it did not allow the sentencer to consider the character and record of an offender and the circumstances of the offense as part of the process of inflicting the death penalty. 428 U.S. at 301-04.

Banks next notes the decision in *Roberts v. Louisiana*, 428 U.S. 325, 333-34 (1976), decided the same day as *Gregg*, *Proffitt*, *Jurek*, and *Woodson*, which also struck down the death penalty statute because, like that in *Woodson*, it failed to provide for any meaningful opportunity for consideration of the character and record of the defendant or the circumstances of the crime. Banks then emphasizes the decision in *Lockett v. Ohio*, 438 U.S. 586, 608 (1978), where the Supreme Court found unconstitutional a state statute that allowed consideration of only a limited number of mitigating factors. Continuing along this line, Banks lists *Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982), where the Supreme Court ruled that a sentencing judge improperly decided, as a matter of law, that he could not consider evidence of a defendant's troubled family history and emotional disturbance as mitigating evidence.

He next references *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986), holding that the trial judge improperly ruled that the jury could not consider a defendant's good conduct in prison as mitigating evidence, *California v. Brown*, 479 U.S. 538, 541 (1987), upholding the sentence of death by interpreting the jury instruction to be consistent with the *Eddings* line of cases, and the opinion in *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987), decided shortly thereafter, where the Supreme Court held that a new sentencing hearing was required because the advisory jury and judge should have

considered evidence of non-statutory mitigating circumstances.

Banks argues that this line of cases, embodying the rule that a jury in a capital case must be permitted to consider all mitigating factors, compelled the holding in *Mills* that "prohibited a state from requiring a jury to be unanimous before they could find the existence of a particular mitigating circumstance." Appellant's Supp. Br. at 9. He continues, "The *Woodson-Lockett-Eddings-Dugger* lines of cases dictate such a result." *Id.* He relies on the following language in *Mills*:

> Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, *Lockett v. Ohio*, *supra*; [citation omitted]; by the sentencing court, *Eddings v. Oklahoma*, *supra*, or by an evidentiary ruling, *Skipper v. South Carolina*, *supra* . The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. Whatever the cause . . . the conclusion would necessarily be the same: `Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing.' *Eddings v. Oklahoma*, 455 U.S., at 117, n. (O'Connor, J., concurring).

Mills, 486 U.S. at 375, quoted in Appellant's Supp. Br. at 9.

Banks finds further support in *Penry v. Lynaugh*, 492 U.S. 302 (1989),[1] the only case in the series to consider the retroactivity issue. The petitioner in *Penry* claimed, *inter alia*, that he was sentenced to death in violation of the Eighth Amendment because the jury was not adequately instructed to take into consideration the mitigating evidence of his mental retardation and abused background. Under the state sentencing scheme, if the jury answered in the affirmative all of the three "special issues" questions required by the statute, the sentencing court was required to impose the death sentence.[2] The same statute had been challenged previously in *Jurek* where the Court rejected the challenge, holding that the state court would interpret the second question to allow the jury to consider mitigating evidence. The *Penry* petitioner argued that the jury would not have been aware that the evidence on which he relied, mental retardation and childhood abuse, could be considered as mitigating circumstances unless it was so instructed by the trial court. The Supreme Court agreed that Penry had a right to resentencing, and remanded so that a new sentencing hearing could be held with instructions informing the jury that it could give effect to the mitigating evidence of Penry's mental retardation and

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[1] The holding in *Penry* rejecting the claim that the Eighth Amendment prohibits the execution of a retarded person was abrogated in *Atkins v. Virginia*, 122 S. Ct. 2242 (2002).

[2] The special issues were (1) whether the defendant's conduct was deliberate and with the reasonable expectation that death would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would be a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. *Penry*, 392 U.S. at 310.

abused background in considering whether to impose a death sentence. *Id.* at 328.

Before reaching its decision, the Court considered whether granting Penry the relief he sought would create a "new rule" under *Teague*. The Court concluded that it was not applying a new rule under *Teague* because, at the time the petitioner's conviction became final, it had already been decided in *Lockett* and *Eddings* that a state could not prevent the sentencer from considering and giving effect to mitigating evidence from the defendant's background, character or circumstances of the offense. *Id.* at 318.

The Commonwealth reads the pre-*Mills* cases differently than does Banks, leading it to conclude that *Mills* announced a new rule. It reads the decisions on which Banks relies, *Lockett*, *Eddings*, *Skipper*, and *Hitchcock*, which represent where the law stood at the time Banks' conviction became final, as reversing the death sentences imposed because the sentencer "had been *entirely precluded* from considering a category of appropriate mitigating evidence." Appellees' Supp. Br. at 4. It points out that in contrast to those cases, the *Mills* jury could hear and consider any evidence of mitigation that the defendant presented. The Commonwealth states that the *Mills* rule (which declared unconstitutional the requirement that jurors agree unanimously on a mitigating factor to be used in the weighing step) went beyond the previously enunciated principle that the jury must be allowed to consider mitigating evidence. The Commonwealth argues that *Mills* enunciated a new rule when it rejected, for the first time, the requirement of unanimity on a particular mitigating factor.

The Commonwealth also contends that the result in *Mills*, a 5-4 decision, was not a foregone conclusion and

"marked a significant leap from prior precedent." Appellees' Supp. Br. at 4. It notes that four present Supreme Court justices dispute that the *Mills* decision was "'controlled or governed' by *Lockett* and *Eddings*, let alone dictated by those earlier decisions." *Id.* at 9, citing *McKoy v. North Carolina*, 494 U.S. 433, 452-56 (1990) (Kennedy, J., concurring opinion); *id.* at 471 (Scalia, J., dissenting opinion, with Rehnquist, C.J., and O'Connor, J.).

The courts of appeals that have considered whether *Mills* announced a new rule have divided on their view. In *Gall v. Parker*, 231 F.3d 265, 322 (6th Cir. 2000), *cert. denied*, 533 U.S. 941 (2001), the Court of Appeals for the Sixth Circuit held that the rule in *Mills* was not new. The court explained that *Lockett* was firmly in place in 1981 when petitioner's conviction became final, and stated that a state court facing the petitioner's claim at that time would have felt compelled to apply *Lockett* as *Mills* ultimately did in 1988. *Id.* at 323. It further stated that *Mills* did not break new ground or impose a new obligation on the states or federal government. *Id. See also DeShields v. Snyder*, 829 F. Supp. 676, 687-88 (D.Del. 1993) (concluding *Mills* did not announce a new rule for *Teague* purposes).

Unlike the Sixth Circuit, the Court of Appeals for the Eighth Circuit concluded that *Mills* announced a new rule that does not apply retroactively on collateral review. In *Miller v. Lockhart*, 65 F.3d 676, 685-86 (8th Cir. 1995), the court held that the result in *Mills* was not dictated by prior cases and while *Lockett* may inform, control or govern *Mills*, *Lockett* did not compel the further holding that a unanimity requirement for mitigating circumstances is unconstitutional. The Court of Appeals for the Fifth Circuit reached the same conclusion in *Cordova v. Collins*, 953 F.2d 167, 173 (5th Cir.

1992), where the court stated that it was precluded by *Teague* from applying *Mills* retroactively.

I previously expressed my view that under the *Teague* analysis the Supreme Court would likely view *Mills* as announcing a new rule, and that it would not apply retroactively. *See Zettlemoyer v. Fulcomer*, 923 F.2d 284, 316-17 n.3 (3d Cir. 1991) (Sloviter, J., dissenting). Although I find the result reached by the majority attractive, and I agree that *Mills* followed logically from earlier cases, I regretfully cannot join the majority's view that *Mills* may be applied retroactively to Banks' case because *Mills* did not create a new rule for purposes of a *Teague* analysis.

My view is informed in large part by several decisions of the Supreme Court which, after analyzing *Teague*, characterized the rules at issue in those cases as new ones. In *Saffle v. Parks*, 494 U.S. 484 (1990), Parks, a habeas petitioner, claimed that a penalty phase jury instruction telling the jury to avoid any influence of sympathy violated his Eighth Amendment rights. Parks argued that jurors must be allowed to base their sentencing decision upon sympathy after hearing the mitigating evidence.

In concluding that the principle Parks advanced created a new rule under *Teague*, the Supreme Court held that *Lockett* and *Eddings* did not dictate such a result. *Id.* at 490. The Court explained that although the decisions in *Lockett* and *Eddings* limit the ability of a state to define the factual bases upon which the capital sentencing decision must be made, they do not speak to whether the state may instruct the sentencer to render its decision on the evidence without sympathy. *Id.* As the *Saffle* Court explained, "[t]here is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its

sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Id.* Because it deemed the rule sought by Parks to be a new one, the Court did not consider the merits of Parks' proposed rule. The Commonwealth relies on the distinction made by the Supreme Court in *Saffle* between *what* mitigating evidence the jury must be allowed to consider as opposed to *how* it must consider the mitigating evidence. Appellees' Supp. Br. at 6.

Another application of the *Teague* new rule/existing rule distinction is found in *Butler v. McKellar*, 494 U.S. 407 (1990). In that case, a habeas petitioner sought the benefit of the holding in *Arizona v. Roberson*, 486 U.S. 675 (1988), that the police may not initiate questioning after the accused invokes his right to counsel in the context of a separate investigation. Butler argued that *Roberson* should be applied to his case because it did not establish a new rule under *Teague* but merely followed the rule established in *Edwards v. Arizona*, 451 U.S. 477 (1981), where the Court held the police must refrain from further questioning after the accused had invoked his right to counsel.

Butler noted that the Supreme Court had stated in *Roberson* that the case was directly controlled by *Edwards*. Nonetheless, the Court in *Butler* decided, in an approach consistent with that it took in *Saffle*, that *Roberson* announced a new rule because its result was not "dictated" by the *Edwards* precedent. 494 U.S. at 409. The Court explained that its outcome in *Roberson* was susceptible to debate among reasonable minds, as evidenced by the differing positions taken by judges of other courts. *Id.* at 415.

Thereafter, in *Graham v. Collins*, 506 U.S. 461 (1993), the Court once again focused on the meaning of the

statement in *Teague* that a new rule is one that was not "*dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. Graham, the habeas petitioner, contended that the sentencing jury was unable to give effect to mitigating evidence of his age, background and character within the confines of the three special issues questions in the same Texas sentencing statute at issue in *Penry*. Although the Court in *Penry* had required instructions that the jury should consider mental retardation and childhood abuse as mitigating evidence, in *Graham* the Court held that the relief Graham sought, instructions that the jury consider age, background and character as mitigating, would require announcement of a new rule. *Id.* at 476-77. It stated that "the determinative question [under *Teague*] is whether reasonable jurists reading the case law that existed in 1984 could have concluded that Graham's sentencing was *not* constitutionally infirm." *Id.* Because it could not say, even with the benefit of the Court's decision in *Penry*, that reasonable jurists would be of one mind on Graham's claim, the ruling sought would be a new rule. The Court noted the limited issue before it in *Penry* and stated that it did not read *Penry* "as effecting a sea change in [the] Court's view of the constitutionality of the former Texas death penalty statute; it does *not* broadly suggest the invalidity of the special issues framework." *Id.* at 474. Thus, it rejected Graham's reliance on *Penry*. The language used in the *Graham* opinion reiterates the need to show the result was "commanded" by the earlier cases if it is not to be viewed as a new rule. *See id.* at 475; *see also Lambrix v. Singletary*, 520 U.S. 518, 528 n.3 (1997) (finding *Espinosa v. Florida*, 505 U.S. 1079 (1992) (per curiam), announced a new rule that was not dictated by precedent where earlier cases did not compel the outcome because they did not answer the definitive question before the Court).

Although *Mills* can be viewed as establishing an incremental step in the series of cases beginning with *Furman*, I believe it is not commanded by the earlier cases in the sense the Court approached that issue in *Saffle*, *Butler* and *Graham*. Hence, I conclude that *Mills* established a new rule within the *Teague* inquiry that does not apply retroactively, unless it falls within one of the two exceptions to *Teague*.

Those exceptions are narrow. The first exception, that for new rules that place "`certain kinds of primary, private individual conduct beyond the power of the criminal law- making authority to proscribe,'" *Caspari*, 510 U.S. at 396 (quoting *Teague*, 489 U.S. at 307), is plainly not applicable. The manner in which the jury must consider mitigating evidence does not relate to the "primary, private, individual conduct" underlying the offense at issue.

Banks contends that if *Mills* created a new rule, the second exception, that for "`watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding," *id.* (quoting *Saffle*, 494 U.S. at 495), applies but I cannot agree. The exception is meant to apply only to a small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty. *Graham*, 506 U.S. at 478 (citations omitted). The *Saffle* Court gave as an example of the type of rule falling within the second exception the rule enunciated in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that a defendant has the right to be represented by counsel in all criminal trials for serious offenses. *See* 494 U.S. at 495. In *Teague*, itself, the Court gave as illustrations for the second exception the classic grounds for the issuance of a writ of habeas corpus -- that the proceeding was dominated by mob violence, that the prosecutor knowingly used perjured testimony or that a

conviction was based upon a confession obtained by brutal methods. *See Teague*, 489 U.S. at 313 (citations omitted).

No Supreme Court case since *Teague* has held the second exception applicable. For example, in *Sawyer v. Smith*, 497 U.S. 227, 245 (1990), the Supreme Court found that the rule in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), which held that the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere, does not satisfy the exception. The Court stated that the second exception would apply only to a new rule that, in addition to improving the accuracy of trial, "'alter[s] our understanding of the *bedrock procedural elements*'" essential to the fairness of a proceeding. 497 U.S. at 242 (citing *Teague*, 489 U.S. at 311 (citation omitted)). It further stated that it is "'unlikely that many such components of basic due process have yet to emerge.'" *Id.* at 243 (quoting *Teague*, 489 U.S. at 313).

Although I believe that the rule in *Mills* is aimed at improving the reliability of capital sentencing, in light of the Supreme Court's decisions in *Saffle*, *Butler*, and *Graham* I cannot conclude that *Mills* alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding. Therefore, I reject Banks' argument that *Mills* falls within the second *Teague* exception.

II.

Notwithstanding my view that *Mills* created a new rule under *Teague* that does not fall within either of the *Teague* exceptions, I believe that *Teague* does not apply in the special circumstances under which the Pennsylvania

Supreme Court reviewed Banks' post-conviction petition. I note initially that in its opinion remanding to this court, the Supreme Court focused only on our failure to analyze the *Teague* issue and did not reach the merits of our holding in *Banks I* "that the Pennsylvania Supreme Court ruling involved an unreasonable application of *Mills*." *Banks v. Horn*, 271 F.3d 527, 545 (3d Cir. 2001). There would be no basis therefore to assume that the Court rejected that holding. But in light of my conclusion that *Mills* established a new rule, it is incumbent on me to explain why I believe we are free to apply *Mills* retroactively to Banks' case. The explanation lies in Pennsylvania's unique relaxed waiver rule in effect at the time of Banks' state post-conviction proceedings.

Banks' 1983 conviction of first degree murder and related crimes was affirmed by the Pennsylvania Supreme Court on direct appeal in 1987. *Commonwealth v. Banks*, 521 A.2d 1 (Pa.), *cert. denied*, 484 U.S. 873 (1987). When Banks appealed the trial court's 1993 denial of his petition for post-conviction relief to the Pennsylvania Supreme Court, he asserted, among other claims, that the jury instructions, jury poll and verdict slip violated *Mills* (decided after Banks' direct appeal was completed) by suggesting that the jury's findings as to mitigating circumstances must be unanimous. The Commonwealth argued that all of the issues raised in the post-conviction petition were waived because Banks failed to raise them on direct appeal. The Pennsylvania Supreme Court agreed that some of the issues could have been raised on direct appeal and thus could be deemed waived under the Post Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541-46 ("PCRA"), but stated that it would "address all of Appellant's claims since the trial court addressed all of those claims and since it is this Court's practice to address all issues arising in a death penalty case irrespective of a finding of waiver." *Commonwealth v. Banks*, 656 A.2d 467, 470 n.7 (Pa. 1995).

The first issue it addressed was Banks' claim that the jury instruction, jury poll and the verdict slip violated the Supreme Court's mandate in *Mills*.

The Pennsylvania Supreme Court considered the *Mills* claim on the merits. This was the first time it did so. It reviewed the jury instruction and found that it had determined in another case that the instruction, "which mirrors the language found in the death penalty statute of [the Pennsylvania] Sentencing Code," did not violate *Mills*. *Id.* at 470. It similarly held that the form of the verdict slip did not violate *Mills*, and that the answers provided by the jurors during the poll did not suggest that they believed unanimity was required in finding mitigating circumstances. *Id.*

A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied. *Caspari*, 510 U.S. at 390; *Kapral v. United States*, 166 F.3d 565, 572 (3d Cir. 1999). Although Banks' direct appeal technically had been exhausted, the Pennsylvania Supreme Court treated his petition for collateral relief like a direct appeal by considering his *Mills* claim on the merits. Because the Pennsylvania Supreme Court applied the relaxed waiver doctrine, Banks' conviction was not final within the meaning of *Teague* until the Pennsylvania Supreme Court affirmed the denial of his PCRA petition and his petition for a writ of certiorari was denied.

The *Teague* rule stems in large part from the desire to accord comity to decisions of the state courts, which, in their review of the case, did not have the opportunity to analyze the effect of a subsequent Supreme Court decision. The

rationale for the comity principle has been articulated most forcefully in the cases dealing with the exhaustion doctrine. More than a century ago, in *Ex parte Royall*, 117 U.S. 241, 251 (1886), the Supreme Court wrote that as a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act.

After Congress' 1948 codification of the exhaustion doctrine at 28 U.S.C. § 2254, the Supreme Court in *Rose v. Lundy*, 455 U.S. 509 (1982), analyzed the policies underlying the statute as follows:

> The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. [citation omitted]. Under our federal system, the federal and state `courts [are] equally bound to guard and protect rights secured by the Constitution.' [citation omitted]. Because `it would be unseemly in our dual system of government for a federal district court to upset a state court conviction *without an opportunity to the state courts to correct a constitutional violation*,' federal courts apply the doctrine of comity, which `teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.' [citations omitted].

Id. at 518 (emphasis added).

More recently, in *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999), where the Court held that a state prisoner

must present his claims to a state supreme court in a petition for discretionary review in order to satisfy the exhaustion requirement, the Court explained that the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts. It further stated, citing *Rose*,

> State courts, like federal courts, are obliged to enforce federal law. Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief. [citations omitted]. This rule of comity reduces friction between the state and federal court systems by avoiding the 'unseem[liness]' of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance. [citations omitted].

Id. at 844-45. *See also Duncan v. Walker*, 533 U.S. 167, 178-79 (2001) (recognizing principle of comity set forth in *O'Sullivan* and *Rose*). We also have recognized the same rationale. *See Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000), *cert. denied*, 532 U.S. 980 (2001).

In this case, because of the application of Pennsylvania's unique relaxed waiver doctrine in capital cases, the Pennsylvania Supreme Court not only had the first opportunity to review Banks' jury instructions, verdict slip, and jury poll in light of *Mills*, but exercised that opportunity. It thus treated that claim as on direct appeal and there is no reason why, even though *Mills* announced a new rule, the

Pennsylvania Supreme Court's resolution of that issue should not be cognizable on federal habeas review. I adhere to the majority's judgment in our decision filed October 31, 2001 that the Pennsylvania Supreme Court's ruling denying Banks' claim under *Mills* was unreasonable. Therefore, I concur in its judgment today.[3]

A True Copy:
Teste:

Clerk of the United States Court of
Appeals for the Third Circuit

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[3] The unique circumstances presented by this case are unlikely to recur because the Pennsylvania Supreme Court now strictly construes the state's Post Conviction Relief Act. In *Commonwealth v. Albrecht*, 720 A.2d 693, 700 (Pa. 1998), the Pennsylvania Supreme Court abandoned its application of a relaxed waiver doctrine in capital cases in PCRA appeals because the "ever-widening application of the doctrine has, in effect, virtually eliminated any semblance of finality in capital cases, and frustrated the efficient use of the resources of the court." Since *Albrecht*, the Pennsylvania Supreme Court has ruled that claims of trial court error, like the *Mills* claim in the present case, are not reviewable on collateral review. *See, e.g., Commonwealth v. Wallace*, 724 A.2d 916, 921 n.5 (Pa. 1999) (finding claims of trial court error that could have been raised on direct review waived). It has also rejected the argument that the abrogation of the relaxed waiver rule should not apply retroactively to PCRA petitions filed before *Albrecht* was issued. *See Commonwealth v. Bracey*, 795 A.2d 935, 941 (Pa. 2001) (because *Albrecht* merely clarified the court's practice of relaxing its waiver rules in death penalty cases, the defendant suffered no constitutional violation by its retroactive application).

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

August 26, 2002

Mr. Scott C. Gartley
200 North River Street
Wilkes-Barre, PA 18711

Re: Martin Horn, Commissioner, Pennsylvania Department of Corrections, et al.
v. George E. Banks
No. 01-1385

Dear Mr. Gartley:

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Sincerely,

/s/
William K. Suter, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

August 5, 2002

Mr. Scott C. Gartley
Assistant Dist. Attorney
200 North River Street
Wilkes-Barre, PA 18711

Re: George E. Banks
v. Martin Horn, Commissioner, Pennsylvania Department of Corrections, et al.
No. 01-8875

Dear Mr. Gartley:

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Sincerely,

/s/
William K. Suter, Clerk

SUPREME COURT OF THE UNITED STATES

No. 01-1385

MARTIN HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners

v.

GEORGE S. BANKS

ORDER ALLOWING CERTIORARI. Filed June 17, 2003.

The petition herein for writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

SUPREME COURT OF THE UNITED STATES

No. 01-1385

MARTIN HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners

v.

GEORGE S. BANKS

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Third Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is reversed, and the case is remanded to the United States Court of Appeals for the Third Circuit for further proceedings in conformity with the opinion of this Court.

June 17, 2002

SUPREME COURT OF THE UNITED STATES

MARTIN HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* GEORGE E. BANKS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-1385. Decided June 17, 2002

PER CURIAM.

The Court of Appeals for the Third Circuit granted respondent federal habeas corpus relief from his death sentence. 271 F.3d 527 (2001). Applying the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) standard of review,[1] the Court of Appeals concluded that the Pennsylvania Supreme Court had unreasonably applied federal law in evaluating respondent's claim that his penalty phase jury instructions and verdict forms were improper under *Mills v. Maryland*, 486 U.S. 367 (1988). The Court of Appeals found it unnecessary to evaluate whether *Mills* applies retroactively to cases on habeas review per *Teague v. Lane*, 489 U.S. 288

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[1] Title 28 U.S.C. §2254(d) was modified by AEDPA and now provides, in part, that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

(1989), because the Pennsylvania Supreme Court had not ruled on retroactivity. 271 F.3d, at 541-543. In avoiding the *Teague* issue, the Court of Appeals directly contravened *Caspari v. Bohlen*, 510 U.S. 383 (1994), in which we held that federal courts must address the *Teague* question when it is properly argued by the government. We thus grant the petition for a writ of certiorari and reverse the Court of Appeals' determination that a *Teague* analysis was unnecessary.[2]

Respondent, George Banks, was convicted of 12 counts of first-degree murder stemming from a series of shootings on September 25, 1982. During the penalty phase of his trial, the jury was instructed, in part:

> "The sentence you impose will depend upon your findings concerning aggravating and mitigating circumstances. The Crime[s] Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances." *Commonwealth v. Banks*, 540 Pa. 143, 150, 656 A.2d 467, 470 (1995).

In relevant part, the verdict form required the jury to check a box indicating that "[w]e the jury have found unanimously" either "[a]t least one aggravating circumstance and no mitigating circumstances," or "[o]ne or more aggravating circumstances which outweigh any mitigating circumstance or circumstances." 271 F.3d, at 549-550. The jury marked the

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[2] We also grant respondent's motion for leave to proceed *in forma pauperis*.

latter box, and also checked two other boxes indicating the aggravating circumstance (multiple offenses punishable by at least life in prison) and mitigating circumstance (extreme mental or emotional disturbance) that it had found. Respondent was sentenced to death on each count of first-degree murder.

After respondent's direct appeal was denied, we decided *Mills*, in which we held that the Constitution prohibits a state from requiring jurors unanimously to agree that a particular mitigating circumstance exists before they are permitted to consider that circumstance in their sentencing determination. 486 U.S., at 374. Subsequently, in state postconviction proceedings, respondent raised a *Mills* challenge to the jury instructions and verdict forms in his case, arguing that they improperly "suggested to the jury that its findings as to mitigating circumstances must be unanimous." 450 Pa., at 149, 656 A.2d, at 470. The Pennsylvania Supreme Court rejected his claim: "[B]oth the verbal instructions given by the court as well as the instructions printed on the verdict slips were correct and not impermissibly suggestive of a unanimity requirement with respect to mitigating circumstances." *Id.*, at 153, 656 A.2d, at 471.

Respondent petitioned for federal habeas relief, which the United States District Court for the Middle District of Pennsylvania denied. 63 F. Supp. 2d 525 (1999). The District Court rejected respondent's *Mills* claim on the merits, applying the AEDPA standard of review articulated in 28 U.S.C. §2254(d): "Supreme Court precedent . . . did not require an outcome contrary to that reached by the state courts." 63 F. Supp. 2d, at 544. Because the court found the AEDPA standard of review dispositive, it did "not address the parties' arguments concerning the retroactivity of *Mills*." *Ibid.*

The Court of Appeals for the Third Circuit reversed the District Court in part, granting respondent relief from his death sentence under *Mills*. The Court of Appeals first asked: "Are we compelled to conduct a retroactivity analysis under *Teague*?" 271 F.3d, at 541. It recognized that, per *Teague*, retroactivity is a "'threshold question,'" but it found "*Teague* not to govern [its] analysis" in this case because "we do not need to focus on anything other than the reasoning and determination of the Pennsylvania Supreme Court," which had not ruled on retroactivity. 271 F.3d, at 541, and n. 13.[3] It rejected petitioners' contention that the state court's failure to rule on retroactivity was irrelevant to whether *Teague* should apply in federal court:

> "*Teague* teaches that the federal courts in habeas proceedings should be reluctant to apply new rules of federal jurisprudence in state court cases decided before such new rules were handed down. Principles of comity and finality counsel that we maintain a circumscribed scope of habeas review. . . . Here, however, as we have noted, the Pennsylvania Supreme Court applied *Mills*. We are examining the application of *Mills*, not because we wish to impose a new rule not considered by the Pennsylvania Supreme Court, but as the court in fact *did* consider and apply it. In such a situation, *Teague* is not implicated. Accordingly, we need ask only whether the

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[3] In deciding not to conduct a *Teague* analysis, the Court of Appeals "acknowledge[d] further that the Pennsylvania Supreme Court has specifically noted its skepticism regarding the retroactive application of *Mills*" and has disagreed with the Court of Appeals' resolution of *Mills* claims similar to respondent's. 271 F.3d, at 542.

> Pennsylvania Supreme Court's application of *Mills* should be disturbed under the AEDPA standards." 271 F.3d, at 543 (citation omitted).

Freed from performing a *Teague* analysis concerning *Mills*' retroactivity, a question which has created some disagreement among the Federal Circuits,[4] the Court of Appeals asked "whether the Pennsylvania Supreme Court determination regarding the constitutionality of the instructions, verdict slip, and polling of the jury involved an unreasonable application of *Mills*." 271 F.3d, at 544. It then found the state court's application of federal law unreasonable under the standards of 28 U.S.C. §2254(d), relying on both *Mills* and *Boyde v. California*, 494 U.S. 370 (1990). 271 F.3d, at 551. The Court of Appeals explained that, "[c]onsidered as a whole, the jury instructions leave no doubt that 'there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.'" *Id.*, at 549 (quoting *Boyde*, *supra*, at 380).

Petitioners seek a writ of certiorari, arguing that the Court of Appeals erred by not performing a *Teague* analysis, by applying *Mills* retroactively to respondent's case, and by concluding that the state court's decision was unreasonable under *Mills*. We find it unnecessary to resolve the latter two of these claims, because we determine that the Court of

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[4] Compare *Gall v. Parker*, 231 F.3d 265, 322 (CA6 2000) (*Teague* does not bar retroactive application of *Mills*), and *Williams v. Dixon*, 961 F.2d 448, 456 (CA4 1992) (same), with *Miller v. Lockhart*, 65 F.3d 676, 685-686 (CA8 1995) (*Teague* bars retroactive application of *Mills*), and *Cordova v. Collins*, 953 F.2d 167, 173 (CA5 1992) (same).

Appeals committed a clear error by failing to perform a *Teague* analysis.

In *Teague*, we explained that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S., at 310.[5] And in *Caspari*, we held that "[a] threshold question in every habeas case, therefore, is whether the court is obligated to apply the *Teague* rule to the defendant's claim. . . . [A] federal court may, but need not, decline to apply *Teague* if the State does not argue it. But if the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court *must* apply *Teague* before considering the merits of the claim." 510 U.S., at 389 (citations omitted). Here, petitioners raised the *Teague* issue both in the District Court, see 63 F. Supp. 2d, at 544, and in the Court of Appeals, see 271 F.3d, at 542-543. Thus, per *Caspari*, a case not cited in the opinion below, it was incumbent upon the Court of Appeals to perform a *Teague* analysis before granting respondent relief under *Mills*. The Court of Appeals erred in concluding that it did "not need to focus on anything other than the reasoning and determination of the Pennsylvania Supreme Court." 271 F.3d, at 541.

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[5] We have recognized two exceptions to *Teague*'s rule. "The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe, . . . or addresses a 'substantive categorical guarante[e] accorded by the Constitution,' such as a rule 'prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Saffle v. Parks*, 494 U.S. 484, 494 (1990) (citations omitted). "The second exception is for 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.*, at 495.

Although the Court of Appeals may have simply over-looked *Caspari*, its opinion can also be read to imply that AEDPA has changed the relevant legal principles articulated in *Caspari*, see 271 F.3d, at 541, n. 13 ("We note, however, that recent decisions have called into question to what extent *Teague* has continued force independent of AEDPA"). While it is of course a necessary prerequisite to federal habeas relief that a prisoner satisfy the AEDPA standard of review set forth in 28 U.S.C. §2254(d) ("[a]n application . . . shall not be granted . . . *unless*" the AEDPA standard of review is satisfied (emphasis added)), none of our post-AEDPA cases have suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard, or that AEDPA relieves courts from the responsibility of addressing properly raised *Teague* arguments. To the contrary, if our post-AEDPA cases suggest anything about AEDPA's relationship to *Teague*, it is that the AEDPA and *Teague* inquiries are distinct. *See, e.g., Tyler v. Cain*, 533 U.S. 656, 669-670 (2001) (O'CONNOR, J., concurring) (construing successive application provisions of AEDPA, 28 U.S.C. §2244(b)(2)(A)); *Williams v. Taylor*, 529 U.S. 362, 412-413 (2000) (construing §2254(d)). Thus, in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state.

We reverse the Court of Appeals' holding that "*Teague* is not implicated" by this case, 271 F.3d, at 543, and remand for further proceedings consistent with this decision.

It is so ordered.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

May 28, 2002

Mr. Scott C. Gartley
Assistant Dist. Attorney
200 North River Street
Wilkes-Barre, PA 18711

Re: George E. Banks
v. Martin Horn, Commissioner, Pennsylvania Department of Corrections, et al.
No. 01-8875

Dear Mr. Gartley:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/
William K. Suter, Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 99-9005

GEORGE E. BANKS,
Appellant

v.

MARTIN HORN, Commissioner, PA Dept of Corrections; JAMES PRICE, Superintendent of State Correctional Institute Greene; RAYMOND J. COLLERAN, Superintendent State Correctional Institute Waymart; COMMONWEALTH OF PENNSYLVANIA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 99-cv-00438)
District Judge: Honorable James F. McClure, Jr.

Present: BECKER, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, and FUENTES,
Circuit Judges

SUR PETITION FOR REHEARING *EN BANC*

The Appellees' Petition for Rehearing *En Banc* and Brief *Amicus Curiae* in support thereof having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED. Chief Judge Becker would have granted rehearing.

BY THE COURT:

/s/ Marjorie O. Rendell
Circuit Judge

Dated: DEC 11 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 99-9005

GEORGE E. BANKS,
Appellant

v.

MARTIN HORN, Commissioner, PA Dept of Corrections; JAMES PRICE, Superintendent of State Correctional Institute Greene; RAYMOND J. COLLERAN, Superintendent of State Correctional Institute Waymart; COMMONWEALTH OF PENNSYLVANIA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 99-cv-00438)
District Judge: Honorable James F. McClure, Jr.

Argued April 2, 2001
Before: SLOVITER, ROTH and RENDELL, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Middle District of

Pennsylvania and was argued on April 2, 2001. On consideration whereof, it is now here

ORDERED and ADJUDGED by this court that Banks' sentence, as set forth in the Judgment and Commitment Order of the District Court entered on September 16, 1999, be and the same is hereby VACATED and the case is REMANDED for resentencing. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/
Marcia M. Waldron, Clerk

Dated: OCT 31 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 99-9005

GEORGE E. BANKS,
Appellant

v.

MARTIN HORN, Commissioner, PA Dept of Corrections; JAMES PRICE, Superintendent of State Correctional Institute Greene; RAYMOND H. COLLERAN, Superintendent of State Correctional Institute Waymart; COMMONWEALTH OF PENNSYLVANIA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 99-cv-00438)
District Judge: Honorable James F. McClure, Jr.

Argued April 2, 2001

Before: SLOVITER, ROTH and RENDELL, Circuit Judges

(Filed: October 31, 2001)

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OPINION OF THE COURT

RENDELL, Circuit Judge.

George Banks was convicted by a Luzerne County, Pennsylvania jury of having committed thirteen murders, and

was sentenced to death. His direct appeals and filings under the Pennsylvania Post-Conviction Relief Act ("PCRA") failed. He sought habeas corpus relief in the District Court under 28 U.S.C. § 2254, which was denied. He comes before us now to appeal the District Court's ruling.

We have jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1291 and 2253. The District Court granted a certificate of appealability as to whether the sentencing phase instructions and forms violated *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), under our precedent in *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997), *cert. denied*, 524 U.S. 911, 118 S.Ct. 2076, 141 L.Ed.2d 151 (1998). By order entered June 27, 2000, we agreed to expand the certificate of appealability to include the issue of whether Banks failed to make a knowing, intelligent, and voluntary waiver of his Sixth Amendment right to counsel.

Because Banks's habeas corpus petition was filed after April of 1996,[1] the role of the District Court in reviewing the state court proceedings was governed by AEDPA.[2] Accordingly, the District Court's task was to determine whether the state court's decision was either contrary to

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[1] We discuss our view of the applicability of AEDPA specifically at 9-10, *infra*.

[2] 28 U.S.C. § 2254(d) states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(Continued)

or an unreasonable application of Supreme Court precedent. The District Court found no basis on which to dispute the state court's ruling. Because the question of whether the District Court appropriately applied the AEDPA standard of review is a question of law, we review its conclusions in that regard de novo. *Berryman v. Morton*, 100 F.3d 1089,1095 (3d Cir. 1996).

A. DISCUSSION

On September 25, 1982 in Wilkes-Barre, Pennsylvania, Banks shot fourteen people with a Colt AR 15 semi-automatic rifle, killing thirteen and wounding one. The AR-15 is a civilian version of the military's M-16 rifle. Banks began his deadly spree at his own home, where he shot and killed three of his girlfriends and their five children, four of whom Banks himself had fathered. Banks then left his home clad in what appeared to be military fatigues. On the street outside he happened upon a group of bystanders who had heard the shots. Banks shot and killed one, a young man who had recognized him, and also shot and seriously wounded another. Banks then carjacked a car and drove to a trailer park, where he shot another girlfriend, their son, a second boy, and the girlfriend's mother. Two other boys survived the attack. After a stand-off at a friend's house, Banks surrendered.

At trial, the defense offered psychiatric experts who testified that Banks, who is bi-racial, suffered from paranoid

(Continued)

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

psychosis and was convinced that he was a victim of a racist conspiracy. The theory was offered that he killed his children to save them from suffering racism as he had. Banks testified on his own behalf and insisted on referring to graphic, gruesome pictures of the murders to try to show that there was a government conspiracy against him. Banks alleged that his shots had only wounded, not killed, some of the victims, and that the police had fired the lethal shots, after which some of the bodies were moved. He also alleged that the medical examiner covered up some wounds and enlarged or altered others to distort the information presented to the jury. He sought throughout the trial to exhume the bodies.

Banks was convicted by a state court jury of twelve counts of first degree murder, one count of third degree murder, criminal attempt to commit murder, two counts of recklessly endangering another person, robbery and theft by unlawful taking or disposition. In the penalty phase, the jury sentenced Banks to death and imprisonment.

Banks filed direct appeals and sought collateral relief in the state courts, as well as filing for federal habeas corpus relief. We need not detail all these proceedings, except that one aspect of the procedural posture of the case deserves attention. The government had argued to the District Court that Banks's habeas corpus petition was not filed in a timely manner. Under AEDPA, Banks was required to file his petition within one year of April 24, 1996, unless the deadline was tolled during the time a "properly filed" state petition for relief was pending. The government contended that because Banks's state court PCRA petition was filed late, it should not be deemed to have been "properly filed" for purposes of the tolling provisions under the federal statute. *See* 28 U.S.C. § 2244(d)(2). The government based its argument in part on *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998)

("We believe that a 'properly filed application' is one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing.").

The government relied on the Pennsylvania Supreme Court's ruling in 1999 that the requirement for timely filing was "jurisdictional," rather than merely a statute of limitations. *See Commonwealth v. Banks*, 556 Pa. 1, 726 A.2d 374, 376 (1999) ("*Banks VI*"). The District Court did not accept that argument, however, noting that Banks could not be said to have been on notice prior to the Pennsylvania Supreme Court's holding in *Banks VI* that the Commonwealth would consider § 9545(b) to be jurisdictional, and that, especially in light of relaxed waiver in capital cases, and the policy of equitable tolling, Banks should not be barred because he reasonably could have construed the time requirement as procedural only. *See Banks v. Horn*, 63 F.Supp.2d 525, 533-34 (M.D. Pa. 1999) ("*Banks VIII*"). The District Court noted that since the exceptions allowed courts to hear some untimely petitions, not every provision in the statute could be jurisdictional, and, absent clear jurisdictional language, it is "entirely reasonable to conclude that § 9545(b) is a statute of limitations rather than a jurisdictional provision." *Id.* at 533. In *Banks VI*, the Pennsylvania Supreme Court cited to its decision in *Commonwealth v. Peterkin*, 554 Pa. 547, 722 A.2d 638 (1998), *petition for habeas corpus dismissed sub nom. Peterkin v. Horn*, 34 F.Supp.2d 289 (E.D. Pa. 1998), which states simply that the "General Assembly amended the PCRA to require that, as a matter of jurisdiction, a PCRA petition must be filed within one year of judgment," but the statement was not the court's holding, and the court did not elaborate on the reasoning underlying its conclusion. *Peterkin*, 722 A.2d at 641. *Banks VI* was the first time the Pennsylvania Supreme Court held that a court was deprived of jurisdiction when the deadline was not met. As

the District Court noted, by concluding that the time limitation was jurisdictional, the Pennsylvania Supreme Court thought it was foreclosed from applying the relaxed waiver standard in Banks's case. 63 F.Supp.2d at 533.

Banks argues that, quite apart from the issue of how the "properly-filed" requirement of 28 U.S.C. § 2244(d)(2) is construed, we should consider his habeas petition as properly before us. First, he urges that because his first petition was filed pre-AEDPA he is not bound by AEDPA's provisions. In the alternative, he takes the position that the issue of timeliness of his habeas petition is not even before us on appeal since the government has not challenged the District Court's ruling in its counterstatement of issues, and has failed to discuss the issue in its brief, except for its conclusory reference to its position in a footnote.

Banks argues that his habeas petition was timely because it was not governed by AEDPA's one-year limitation period, but, rather, by pre-AEDPA law. In support of this theory, Banks urges that the habeas petition he filed in the District Court after AEDPA merely reasserted claims previously filed pre-AEDPA, so that it "relates back to the original filing date of Banks' pre-AEDPA petition." We disagree. The applicability of AEDPA does not turn upon a comparison of claims in successive petitions. It is, rather, governed solely by the date of the petition's filing. *See, e.g., Hull v. Kyler*, 190 F.3d 88, 103 (3d Cir. 1999); *Jones v. Morton*, 195 F.3d 153, 160-61 (3d Cir. 1999). Any petition that is filed subsequent to AEDPA is governed by AEDPA standards. In his argument, Banks relies on *Coss v. Lackawanna Cty. Dist.*

Atty., 204 F.3d 453 (3d Cir. 2000).[3] But *Coss* involved a unique factual setting in which Coss's petition was pending pre-AEDPA, and while it was pending, Coss filed another petition solely to *remove* the claims that the district court had held unexhausted. We thus viewed the second petition as "tantamount to a further amendment or clarification to the initial petition, filed at the direction of the District Court. . . ." 204 F.3d at 461. We were addressing the merits of his pre-AEDPA petition. If, instead, Coss's petition had been dismissed, and he had then filed either an identical petition or a petition absent the unexhausted claims after AEDPA's effective date, we would have been compelled to find that AEDPA controlled. Once a petition has been dismissed, a subsequent petition is a new petition and is governed by AEDPA.

As to Banks's contention that the issue as to whether his petition is time-barred is not before us because of the government's failure to specifically raise and brief the issue by way of cross-appeal, we believe that, in light of the District Court's careful analysis of this issue and its importance, and because the government did make reference to the issue albeit in a footnote -- we should examine whether the statutory filing requirements were met. *Silber v. United States*, 370 U.S. 717, 717-18, 82 S. Ct. 1287, 8 L.Ed.2d 798 (1962).[4]

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[3] The Supreme Court reversed and remanded on grounds not at issue here. *See Lackawanna Cty. Dist. Atty. v. Coss*, 531 U.S. 923, 121 S.Ct. 297, 148 L.Ed.2d 238 (2000).

[4] Even if not raised, we believe we could consider this issue sua sponte. "While ordinarily we do not take note of errors not called to the attention of the Court of Appeals nor properly raised

(Continued)

Should Banks's second state court PCRA filed in January 1997 be deemed properly filed such that the one-year AEDPA filing requirement did not begin to run until the Pennsylvania Supreme Court finally ruled on it in March 1999? If so, then Banks's habeas petition was filed in time. If not, then we need to decide whether the AEDPA one-year period barred his petition or whether it should be equitably tolled.[5]

It seems clear that, technically, Banks's filing of his second PCRA in January 1997 was too late under Pennsylvania law. This is because the Pennsylvania legislature had enacted legislation in November 1995 requiring all petitions, including second or successive petitions, to be filed within one year of the final order on direct appeal unless

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(Continued)

here, that rule is not without exception. The Court has `the power to notice a `plain error' though it is not assigned or specified,' . . . `In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *Silber*, 370 U.S. 717-18, 82 S.Ct. 1287, 8 L.Ed.2d 798 (internal citations omitted). *See also Acosta v. Artuz*, 221 F.3d 117 (2d Cir. 2000); *Kiser v. Johnson*, 163 F.3d 326 (5th Cir. 1999).

[5] We note that the Supreme Court's recent ruling in *Duncan v. Walker* does not bear on this issue because here, unlike the situation in *Duncan*, the time period was violated unless there is equitable tolling for the state proceedings, even if the time during which Banks's first federal habeas petition was pending is taken into account. 533 U.S. 167, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001).

certain exceptions were met.[6] 42 Pa.Cons.Stat. § 9545 (Act of November 17, 1995, Special Session No. 1 P.L. 1118, No. 32, effective in 60 days).

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[6] The text of the relevant statutory provision is:

(B) TIME FOR FILING PETITION.--

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States; (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

However, was the petition therefore necessarily not "properly filed"? While we could explore this concept under the applicable Pennsylvania law and under the federal habeas case law, *see, e.g., Artuz v. Bennett*, 531 U.S. 4, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000), we need not do so, because we conclude that, even were we to decide that the late filing of Banks's second PCRA rendered it not "properly filed," the District Court appropriately called on equitable principles to toll the one-year AEDPA requirement given this unusual fact pattern. Here, as the District Court points out, the state of the Pennsylvania law regarding the nature of the filing requirement was unclear, and Banks could reasonably have viewed the state time limit as a mere statute of limitations subject to equitable tolling, not, as the Pennsylvania Supreme Court later held in *Banks VI*, a jurisdictional requirement. The District Court noted that viewing this later ruling as a bar would result in unfair forfeiture without notice. *Banks VIII* at 534. This circumstance provides a basis for us to call on equitable principles in application of *our own* federal time parameters -- the one-year AEDPA requirement.

We have recently had occasion to examine this issue. In *Fahy v. Horn*, we described the state of the law at the time of Fahy's fourth PCRA petition, which was also the time period when Banks's petition was pending, as "inhibitively opaque." 240 F.3d 239 (3d Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S.Ct. 323, ___ L.Ed.2d ___ (2001). We noted that in *Banks*, we had required Banks to return to state court because even *we* believed the relaxed waiver rule might well apply. How can we expect Banks to have predicted the ultimate ruling of the Pennsylvania Supreme Court when *we* could not?

In *Fahy* we stated:

> When state law is unclear regarding the operation of a procedural filing requirement, the petitioner files in state court because of his or her reasonable belief that a § 2254 petition would be dismissed as unexhausted, and the state petition is ultimately denied on these grounds, then it would be unfair not to toll the statute of limitations during the pendency of that state petition up to the highest reviewing state court.

Fahy v. Horn, 240 F.3d at 245.

The same rule applies here. The Pennsylvania Supreme Court had denied Banks's first PCRA petition in March 1995, and he had filed his first habeas petition in February 1996. Thus, his federal action was pending when AEDPA was passed in April 1996. Because the district court determined that Banks's claims could be adjudicated and the petition was not subject to dismissal as mixed, it was not until the Third Circuit reversed that determination and ordered the petition dismissed as mixed in September 1997 that it would be equitable to begin calculating a delay in filing against Banks, and because he filed his second PCRA petition while the appeal was still pending, there was no delay whatsoever. Subsequently, here, as in *Fahy*, Banks did not delay in seeking federal relief, filing his habeas petition two weeks after his state collateral proceedings were concluded. Thus, the equities are in his favor. Not only is there "no evidence of abuse of the process" by Banks, but it seems as clear as in Fahy's case that he "diligently and reasonably asserted his claims." *Id.* at 244-45. Accordingly, we conclude that the District Court was quite correct in its resort to equitable principles, and properly entertained Banks's petition on its merits, as we will as well.

B. ISSUES ON APPEAL

We granted Banks a Certificate of Appealability regarding two issues:

(1) Banks contends that the trial court erred in not having explored whether he was making a knowing, voluntary and intelligent waiver of his right to counsel during the trial. However, the District Court concluded that, by pursuing his own strategy at trial, Banks's situation was one of hybrid representation, but that there was no clear requirement under either United States Supreme Court precedent, nor under our case law, that a defendant "is entitled to an inquiry by the trial court before it exercises its discretion to permit hybrid representation." *Banks VIII*, 63 F.Supp.2d at 543.

(2) Banks contends that the jury instructions and verdict sheets during the penalty phase violated *Mills v. Maryland*, and the Pennsylvania Supreme Court unreasonably applied the Supreme Court precedent in finding that his death sentence was not constitutionally infirm.[7] The District Court rejected Banks's challenge, reasoning that it was to evaluate whether *Mills* applied only to Banks's trial and

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[7] The District Court had granted a certificate regarding the *Mills* issue and we enlarged it to include the Sixth Amendment issue. *Ouska v. Cahill-Masching*, 246 F.3d 1036, 1045 (7th Cir. 2001). The Third Circuit's Local Appellate Rules provide: "If the district court grants a certificate of appealability as to only some issues, the court of appeals will not consider uncertified issues unless petitioner first seeks, and the court of appeals grants certification of additional issues." 3d Cir. R. 22.1(b).

We note that the issue of Banks's competency to stand trial was previously litigated on appeal and is not before us.

direct appeal, and concluded that it did not, since Banks's conviction became final before *Mills* was decided and *Mills* has not been made retroactive by the United States Supreme Court. The District Court further distinguished our holding in *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997), reasoning that *Frey* involved a pre-AEDPA petition. *Id.* at 543-44.

We will address these issues in turn.

(1) Waiver of Representation of Counsel

Banks urges that the trial court should have conducted a colloquy with him, establishing that he knowingly and voluntarily waived his right to counsel before allowing Banks to engage in certain conduct during the trial, contrary to the advice of his counsel. Banks was represented throughout the proceeding, but he contends that he took over certain "core functions" at times, such that a colloquy was required.

Clearly, Banks and his counsel disagreed as to whether he should testify, and as to the scope of the testimony. Banks wanted to testify because he believed that it was critical for him to expose the conspiracy that he urged resulted in the deaths and in altered injuries to those he was accused of killing. During his testimony, therefore, Banks introduced the coroner's reports and photographs that had been ruled inadmissible prior to trial. Although counsel and the trial court warned Banks that the pictures were inflammatory, and that his testimony about the pictures and his showing them to the jury would allow the prosecutors to use them as well, Banks insisted that he was "forced into this," and that the pictures were "part of my evidence to the fact that they've twisted everything around."

Banks also, and again contrary to the advice of counsel, insisted that the medical examiners be questioned about details and supposed inconsistencies in the photographs. The colloquy between counsel and the trial court before the recall of one of the medical examiners is telling:

> Defendant: [T]hey're asking me to do the questioning. I prefer not to, because I'm not qualified to do it.
>
> The Court: Then I will ask you to consult with counsel and I will ask counsel to prepare and ask the questions.
>
> [Defense counsel]: Your Honor, the three of us have reviewed this, and we can't conceive of any questions to ask the doctor.
>
> The Court: Mr. Banks will discuss with you the questions he proposes to ask, and I think counsel should ask the questions.

Banks himself also cross-examined a deputy coroner and a police officer.

There is no question that the defendant's testimony and the introduction of the previously excluded photographs were, as the Court predicted, inflammatory. There is also no question that the testimony, the introduction of the photographs, and the examinations of the witnesses were contrary to the advice of counsel, and eroded the protections counsel had secured for Banks prior to trial. We note that the trial court warned Banks repeatedly of his need to adhere to the rules of the court and insisted that where the rules of evidence and procedure were concerned it would "treat [Banks] like a lawyer," and that one could infer from the court's

phrasing that Banks was to some extent acting as his own counsel. At no point, however, did Banks request that counsel withdraw and that he be allowed to proceed pro se.

The issue that Banks has presented to us is whether, even absent an affirmative declaration of a desire to proceed pro se, his actions were so contrary to counsel's advice and involved such significant control over his defense as to render him effectively unrepresented, and whether, if we so find, the trial court should have concluded that Banks was effectively proceeding pro se and should have conducted a Sixth Amendment waiver inquiry before allowing Banks to testify. The issue that we must actually resolve, however, is much more circumscribed, because of the scope of review under AEDPA. That is to say, our analysis is limited to whether the court failed to apply, or misapplied, clearly established U.S. Supreme Court precedent. The first step in our analysis, therefore, is to define whether any U.S. Supreme Court precedent mandated -- either directly or by extension to these facts -- that the trial court personally ensure that Banks was making a voluntary, intelligent, and knowing waiver of his Sixth Amendment right to counsel in a setting such as this. We note that the trial court did discuss certain rights with Banks before he testified:

> Mr. Banks, once again, I will preface my remarks by saying this is not a lecture. This is a responsibility I have as a trial judge, to be assured that you understand the rights that you have and the rights, by testifying, that you'll give up.

In the course of this discussion, the court advised Banks that he had a right not to testify and that he could be prejudiced if he disregarded counsel's advice by his testimony and by introducing exhibits as part of his testimony.

But the court never specifically inquired as to a waiver by Banks of his Sixth Amendment right to counsel:

> You understand, do you not, that the procedure is that counsel ask questions? May I suggest to you then that I will give you some time. You will consult with your counsel, so that you may give them the questions, so that they can properly phrase them for you.
>
> Let me caution you on another matter that might come up. You understand if you propose to use any exhibits, that you will be required to comply with the rules of evidence concerning exhibits.

The court did inquire whether Banks understood that he was not required to testify, that he had a constitutional right to remain silent, and that by testifying he would give up the right to remain silent. When Banks asked if he could continue to rely on the Fifth Amendment, the court explained to him that he could not, assuring Banks that "I don't want you to do anything that will harm you." The court further explained that the testimony might open avenues for questioning that would otherwise remain closed and urged Banks to follow counsel's advice. Throughout the discussion, Banks remained adamant that he wanted to testify. Thus, in evaluating the case law we are not assessing the quality of the inquiry made by the trial court, but only whether an inquiry specific to the waiver of counsel was mandated.

The two Supreme Court opinions referenced by the parties, *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), *reh'g denied*, 465 U.S. 1112, 104 S.Ct. 1620, 80 L.Ed.2d 148, address situations that are different from the case before us, not only on

the facts, but also on the principles that informed the Court's decisions. *Faretta* recognizes that a defendant who indicates a desire to represent himself and proceed without counsel has the right to do so, as long as he knowingly and intelligently waives his right to counsel. The defendant in *Faretta* wanted to manage his own defense; he did not want counsel to act on his behalf. The issue before the court was the extent to which a defendant has the right to present his own defense. The Court concluded that "the defendant . . . must be free personally to decide whether in his particular case counsel is to his advantage." 422 U.S. at 834, 95 S.Ct. 2525. That decision must be honored by the court, even if the choice is detrimental, "out of 'that respect for the individual which is the lifeblood of the law.'" *Id.* (*quoting Illinois v. Allen*, 397 U.S. 337, 350-351, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), *reh'g denied*, 398 U.S. 915, 90 S.Ct. 1684, 26 L.Ed.2d 80).

The Court recognized that managing one's own defense results in the relinquishment of "the traditional benefits associated with the right to counsel." 422 U.S. at 835, 95 S.Ct. 2525. It is the relinquishing of these benefits that triggers the requirement of a knowing, voluntary, and intelligent waiver. *Id.* at 835, 95 S.Ct. 2525.

In *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), reh'g denied, 465 U.S. 1112, 104 S.Ct. 1620, 80 L.Ed.2d 148, the Supreme Court addressed the scope of the right to conduct one's own defense, holding that this right was not violated by the unsolicited participation of standby counsel. Again, the focus of the Court was on determining to what extent a court could circumscribe a defendant's right to present his own defense. The Court found that the appointment and limited participation of standby counsel was not inconsistent with the "dignity and autonomy of the accused." *Id.* at 177, 104 S.Ct. 944. The Court noted that a

"defendant does not have a constitutional right to choreograph special appearances by counsel." *Id.* at 183, 104 S.Ct. 944. The interest of the court in appointing standby counsel is to assist the defendant to comply with court rules and protocol and enable him to achieve "his own clearly indicated goals." *Id.* at 184, 104 S.Ct. 944.

While *McKaskle* provides guidance to courts as to where the line is crossed between the assistance or enabling of standby counsel to an already pro se defendant and impermissible intrusion, it does not provide any guidance to courts for the reverse situation, i.e., when does a defendant who is represented by counsel cross the line from being represented to proceeding pro se? We cannot say that either *Faretta* or *McKaskle*, both affirmations of the liberty and autonomy rights of a defendant, define a line of self-expression that defendants cannot cross without the court's securing of a knowing, voluntary and intelligent waiver.

Banks agreed to the continued representation by his counsel throughout trial, and while he performed some tasks contrary to counsel's advice, he never did so unattended or unadvised by counsel. In fact, it is clear from the record that he received counsel's advice on an ongoing basis. A disagreement between counsel and a defendant is not enough in itself to render a defendant pro se. *Hakeem v. Beyer*, 990 F.2d 750, 765 (3d Cir. 1993). Accordingly, the cases requiring a waiver colloquy when the defendant indicates a desire to proceed pro se do not in themselves dictate such a procedure here.

Moreover, to the extent that Banks has urged that the right to testify on one's behalf -- which was perhaps the most troubling of Banks's strategic decisions -- should be somehow constricted if necessary to ensure Sixth Amendment

rights, this seems to run directly counter to *Faretta*, and its focus on an individual's right to control his defense. *Faretta*, 422 U.S. at 834, 95 S.Ct. 2525. Further, we know of no 15 case that interposes a requirement of a colloquy in connection with the right to testify on one's own behalf.[8]

The Pennsylvania Supreme Court's analysis focused solely on Banks's decision as an exercise of his right to testify on his own behalf. It did not view Banks's choices as implicating his Sixth Amendment rights.[9] Banks says that this analysis is contrary to a line of cases that stand for the proposition that such a colloquy is required when there is "hybrid representation," that is, where an attorney and a defendant each address the court or in other ways share defense functions.[10]

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[8] In *Boardman v. Estelle*, the Ninth Circuit analogized a right to allocution to the right to testify in one's own behalf and characterized them as "entirely separate. . . . A defendant who elects representation by counsel does not simultaneously waive his right to testify at trial." 957 F.2d 1523, 1528 (9th Cir.), *cert. denied*, 506 U.S. 904, 113 S.Ct. 297, 121 L.Ed.2d 221 (1992). Likewise, the exercise of one's personal right to testify is not tantamount to proceeding pro se.

[9] The dissent in *Banks II*, however, both viewed the issue as raising Sixth Amendment concerns and viewed the trial court as violating Banks's Sixth Amendment rights. See discussion, *infra* at 25-26.

[10] Interestingly, Banks's approach to this issue seems to have come full circle and, at oral argument, his counsel argued the issue precisely as the Pennsylvania Supreme Court had characterized it, namely, as a duty to prevent Banks from testifying. And, in his brief, Banks quotes the extensive colloquy between Banks and the

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In the typical hybrid representation, a trial court acts in its discretion to appoint standby counsel for a pro se defendant who later challenges the attorney's role as overly intrusive under *Faretta*'s right to self- representation. *See, e.g., McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), *reh'g denied*, 465 U.S. 1112, 104 S.Ct. 1620, 80 L.Ed.2d 148. Some federal courts have opined that a colloquy should be conducted when the defendant assumes "core functions" of the defense.

> When the accused assumes functions that are at the core of the lawyer's traditional role . . . he will often undermine his own defense. Because he has a constitutional right to have his lawyer perform core functions, he must knowingly and intelligently waive that right.

United States v. Kimmel, 672 F.2d 720, 721 (9th Cir. 1982). *But see United States v. Leggett*, 81 F.3d 220 (D.C.Cir. 1996) (cross-examination of some witnesses, asking of questions of defense counsel, proposing questions for other witnesses and delivering closing argument did not require the trial court to give waiver warnings); *see also Bontempo v. Fenton*, 692 F.2d 954, 960 (3d Cir. 1982), *cert. denied*, 460 U.S. 1055, 103 S.Ct. 1506, 75 L.Ed.2d 935 (1983) (supplemental closing statement); *Robinson v. United States*, 897 F.2d 903, 906-07 (7th Cir. 1990) (same).

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trial court before, and during, his testimony, and urges that the court should have mentioned the right to counsel and warned of inherent danger in waiving counsel. We find no support for the proposition under *Faretta* or *McKaskle*, nor has any Supreme Court case been referenced as authority for this proposition.

As we have noted, under the standards of *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), we may challenge the state court analysis only if it is contrary to or unreasonably applies clearly established federal law. It is unclear whether it must be stated in Supreme Court precedent, or whether it may be derived from principles enunciated in Supreme Court precedent. *Id.* at 408-09 ("Today's case does not require us to decide how such 'extension of legal principle' cases should be treated under § 2254(d)(1)."). Regardless, we conclude that the federal decisions do not apply so directly to the facts at hand so as to constitute an extension of principles enunciated in Supreme Court precedent. The lack of clearly applicable principles in such precedent is fatal to Banks's argument. While the decisions Banks cites might inform our decision were we reviewing a district court trial, we are not here engaged in "the broad exercise of supervisory power" that we would possess over a district trial court decision. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) (quoting from the appellate court opinion, 473 F.2d 1236, 1238 (1st Cir. 1973)). *See, e.g., United States v. Davis*, 269 F.3d 514 (5th Cir. 2001) (reversing the district court's handling of hybrid representation situation).

The Supreme Court has never addressed a situation such as this, let alone indicated that the situation would implicate a Sixth Amendment right in the same way as defendant's right to proceed without counsel, or the prerequisites to a defendant's proceeding pro se. Banks did not reject the assistance of counsel; he acted with counsel's assistance, but chose to reject the advice of counsel. Although we have found some federal decisions that have adapted the case law to "hybrid" factual settings, we find none of these rulings to be persuasive extensions of U.S. Supreme Court precedent so

as to constitute clearly established law regarding Sixth Amendment violations in such a fact pattern.[11] Further, many

[11] We note that Banks cites several Pennsylvania cases that he contends bear on the issue before us: *Commonwealth v. Bell*, 442 Pa. 566, 276 A.2d 834 (1971); *Commonwealth v. McGrogan*, 449 Pa. 584, 297 A.2d 456 (1972); *Commonwealth v. Palmer*, 315 Pa.Super. 601, 462 A.2d 755 (1983). In one, the Pennsylvania Supreme Court stated that the introduction of evidence is a function that is allocated solely to counsel. *Commonwealth v. Bell*, 442 Pa. 566, 276 A.2d 834 (1971). In *Banks I*, Chief Justice Nix dissented, and was joined in his dissent by Justice Zappala, because he concluded that, in accordance with *Bell*, Banks had assumed a function allocated to counsel and "was acting as his own attorney and was representing himself." 521 A.2d at 23. While Chief Justice Nix's interpretation of Pennsylvania case law would require a waiver colloquy so as to afford federal constitutional protections, his was not the majority opinion. None of the Pennsylvania cases referred to us by Banks appears to be directly on point. Further, it is not our province to determine whether the Pennsylvania Supreme Court's decision was contrary to, or an unreasonable application of, its *own* precedent, but, rather, of clearly established federal precedent.

The three federal cases that Banks cites in addition to *McKaskle* and *Faretta* as defining an "exclusive province of counsel" at trial are inapposite. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) is concerned exclusively with whether *appellate* counsel is obligated to raise all nonfrivolous claims proffered by the appellant. *See id.* at n. 7. In *Vess v. Peyton*, 352 F.2d 325 (4th Cir. 1965), *cert. denied*, 383 U.S. 953, 86 S.Ct. 1215, 16 L.Ed.2d 214 (1966), the Fourth Circuit affirmed the district court's determination that there was no error in appellant's not having been provided counsel at a preliminary hearing (a determination that is no longer good law) and that the record supported the conclusion that appellant's guilty plea was knowingly and voluntarily offered. The court also rejected appellant's

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of the decisions are unpublished and have no precedential value.[12] Accordingly, we agree with the District Court that Banks is not entitled to habeas relief on this ground.

(2) Application of Mills v. Maryland in the Penalty Phase

Banks contends that the Pennsylvania Supreme Court determination regarding the jury instructions and verdict slip during the penalty phase involved an unreasonable application of *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). The District Court did not disturb the Pennsylvania Supreme Court's ruling regarding the penalty phase, reasoning that *Mills v. Maryland* was not retroactive, and also stating in summary fashion that "Supreme Court precedent (in the form of *Mills* and *McKoy*) did not require an outcome contrary to that reached by the state courts." *Banks VIII* at 544. We disagree with both conclusions.

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contention that the failure to call certain witnesses suggested by the defendant did not constitute inadequate representation of counsel. Likewise, *Buckelew v. United States*, 575 F.2d 515 (5th Cir. 1978) rejected a claim that an uncalled out-of-state witness constituted ineffective assistance of counsel. None of these cases could be read to mandate that a trial judge treat defendant's insistence upon testifying, and his introduction of evidence as part of that testimony -- or even the directing and conducting of the cross-examination -- as an assertion of a right to proceed pro se.

[12] *See, e.g., Robinson v. United States*, 897 F.2d 903 (7th Cir. 1990); *United States v. Parker*, 176 F.3d 486 (9th Cir. 1999) (unpublished); *Islam v. Miller*, 166 F.3d 1200 (2d Cir. 1998) (unpublished); *United States v. Demeke*, 152 F.3d 921 (2d Cir. 1998) (unpublished).

(a) Does Mills Apply?

We first note that the District Court apparently misperceived the way in which the AEDPA standard applies to the relevant state court proceeding. The Court stated that the *Mills* decision was rendered in 1988, five years after Banks's conviction and sentence.

However, the point in time at which the Supreme Court jurisprudence must have been "clearly established" is at the time that the state court makes the ruling on the federal constitutional issue that is being scrutinized. The Pennsylvania Supreme Court issued its opinion in *Banks II*, construing *Mills* in 1995, eight years after *Mills* became law. If the Pennsylvania Supreme Court had questioned whether *Mills* was applicable to the trial court's conduct, we would have needed to inquire whether Mills codified law that was clearly established at the time of the trial. But that is not the question before us. AEDPA defines the parameters of federal court review of state determinations of federal law. In the Pennsylvania Supreme Court opinion, it applied *Mills*. We are being asked to determine whether that application of *Mills* was contrary to, or an unreasonable application of, clearly established federal law. To make that determination, it is only the state court's decision that cited to *Mills* and the law as it was clearly established then, in 1995, not the law at the time of Banks's sentencing, that matters.

(b) Are We Compelled to Conduct a Retroactivity Analysis under Teague?

The Commonwealth also argues that we should not apply the lessons of *Mills* to Banks's case, because Banks's conviction became final before *Mills* was decided, and because the Pennsylvania Supreme Court has consistently decided that *Mills* is not retroactive. Under *Teague v. Lane*, 489 U.S. 288, 300, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), *reh'g denied*, 490 U.S. 1031, 109 S.Ct. 1771, 104 L.Ed.2d 206 (1989), retroactivity is a "threshold question," because it is in that determination that a court establishes whether a rule enunciated on the basis of a set of facts will apply only prospectively or will be applied retroactively to all who are similarly situated. *See id.* at 299-301, 109 S.Ct. 1060.[13] Retroactivity analyses can be complex, but here the analysis is not, because we do not need to focus on anything other than the reasoning and determination of the Pennsylvania Supreme Court. We acknowledge that the Pennsylvania Supreme Court has stated that it will not give retroactive effect to "new rules" handed down after a conviction has become final.[14] We acknowledge further that the

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[13] Because we find *Teague* not to govern our analysis, our discussion of its principles are limited to explaining why it is not controlling here, despite the arguments of the parties. We note, however, that recent decisions have called into question to what extent *Teague* has continued force independent of AEDPA. *See, e.g., Tyler v. Cain*, 533 U.S. 656, ____-____, 121 S.Ct. 2478, 2483-84, 150 L.Ed.2d 632 (June 28, 2001) (rejecting application of the *Teague* exceptions to construe *Cage*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) as retroactive under 28 U.S.C. § 2244(b)(2)(A)).

[14] "[A] new rule of law will not be applied retroactively 'to

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Pennsylvania Supreme Court has specifically noted its skepticism regarding the retroactive application of *Mills* to cases other than non-final sentences, *see, e.g., Commonwealth v. Cross*, 555 Pa. 603, 726 A.2d 333, 338 n. 4, (1999), and that it disagrees with our ruling in *Frey*.[15] *See Cross*, 726 A.2d at 337.

However, the ruling in *Banks II* is what determines the scope of our review, and in *Banks II*, the Pennsylvania Supreme Court held that, following its previous rulings in this area, the sentencing process did not violate *Mills*. To determine whether the Pennsylvania Supreme Court's ruling in *Banks* was contrary to, or involved an unreasonable application of, Supreme Court precedent, we do not need to undertake any retroactivity analysis, because, notably, the

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any case on collateral review unless that decision was handed down during the pendency of appellant's direct appeal and the issue was properly preserved there or . . . was nonwaivable.'" *Commonwealth v. Cross*, 555 Pa. 603, 726 A.2d 333, 338 (1999) (*quoting Commonwealth v. Gillespie*, 512 Pa. 349, 516 A.2d 1180, 1183 (1986)).

[15] The Pennsylvania Supreme Court has asserted that it has "concurrent jurisdiction" with this court "as to federal constitutional questions" and as such may "formulate its own interpretation of Supreme Court precedent, which may be in opposition to that stated by the lower federal courts." *Cross*, 726 A.2d at 338 n. 4. At the same time, the United States Supreme Court has made it clear that a federal court must apply independent judgment in its interpretation of federal law and if, "after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody . . . violates the Constitution, that independent judgment should prevail." *Williams*, 529 U.S. at 389, 120 S.Ct. 1495.

Pennsylvania Supreme Court undertook none. It examined the penalty phase on the merits based on *Mills*, making no reference to any concerns regarding *Mills'* applicability to the case. *Banks II*, 656 A.2d 470.

The government argues that if we are considering the applicability of a new rule (assuming *Mills* is a new rule -- which is not at all clear[16]), we must be guided by *Teague v.*

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[16] To the extent that *Teague* still provides the appropriate scheme for analysis, *see supra* n. 13, we note that the Sixth Circuit has explicitly found that *Mills* does not comprise a "new rule" under *Teague*. *Gall v. Parker*, 231 F.3d 265, 322 (6th Cir. 2000), *reh'g and reh'g en banc denied; cert. denied*, ____ U.S. ____, 121 S.Ct. 2577, 150 L.Ed.2d 739 (2001). *Accord, DeShields v. Snyder*, 829 F.Supp. 676, 688 (D.Del. 1993). Other courts have determined that it is immaterial whether *Mills* is a new rule, because, whether or not the rule is new, it falls within the second exception of *Teague*. *See, e.g., Williams v. Dixon*, 961 F.2d 448 (4th Cir.), *cert. denied*, 506 U.S. 991, 113 S.Ct. 510, 121 L.Ed.2d 445 (1992). The Fifth and the Eighth Circuit, in contrast, have classified *Mills* as a new rule. *See, e.g., Miller v. Lockhart*, 65 F.3d 676, 686 (8th Cir. 1995); *Cordova v. Collins*, 953 F.2d 167, 173 (5th Cir.), *cert. denied*, 502 U.S. 1067, 112 S.Ct. 959, 117 L.Ed.2d 125 (1992). Both of these cases are distinguishable, however. In *Cordova* the Fifth Circuit summarily concluded that *Teague* precluded it from applying a decision announced after Cordova's conviction was final. The court supplied no analysis nor explanation to support its conclusion. 953 F.2d at 173. In *Miller*, only one of the four significant pre-*Mills* cases had been decided by the U.S. Supreme Court prior to Miller's conviction, and that decision, *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), was a plurality opinion whose fractured opinions were considered in *Miller* not to" 'compel' the further holding that a unanimity requirement for mitigating circumstances is unconstitutional." 65 F.3d at 686. The other three decisions -- that were

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Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and *O'Dell v. Netherland*, 521 U.S. 151, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997), and refuse to apply such new rule unless one of the two narrow exceptions referenced in the case law applies.[17] However, we conclude that we need not explore

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decided prior to Banks's conviction becoming final -- were *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (applying *Lockett* in a 5-4 decision with two concurrences); *Skipper v. South Carolina*, 476 U.S. 1, 4, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (characterizing the rules that a sentencer may not be precluded from considering any "aspect of a defendant's character or record and any of the circumstances of the offense" and "that a sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence" as well established; there were six justices in the majority and three concurring); *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) (unanimously holding that mitigating evidence was wrongly excluded from consideration).

[17] The two exceptions are:

(1) "rules 'forbidding criminal punishment of certain primary conduct [and] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense'" *O'Dell v. Netherland*, 521 U.S. 151, 157, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997) (*quoting Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989));

(2) "'watershed rules' of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *O'Dell* at 157 (quoting *Graham v. Collins*, 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993), *reh'g denied*, 507 U.S. 968, 113 S.Ct. 1406, 122 L.Ed.2d 778.).

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the contours of *Mills* (and its predecessors) as to whether it is "new;" nor do we need to consider, as the parties have done, the applicability of the exceptions. This is because, as the brief of amici curiae notes,[18] resort to *Teague* is misplaced. *Teague* teaches that the federal courts in habeas corpus proceedings should be reluctant to apply new rules of federal jurisprudence in state court cases decided before such new rules were handed down. Principles of comity and finality counsel that we maintain a circumscribed scope of habeas review. *Teague*, 489 U.S. at 308, 109 S.Ct. 1060. Here, however, as we have noted, the Pennsylvania Supreme Court applied *Mills*. We are examining the application of *Mills*, not because we wish to impose a new rule not considered by the Pennsylvania Supreme Court, but as the court in fact *did* consider and apply it.[19] In such a situation, *Teague* is not implicated. Accordingly, we need ask only whether the

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As noted in *supra* n. 16, the Fourth Circuit has found *Mills* to fall within the second *Teague* exception.

[18] Brief of Amici Curiae, The Pennsylvania Association of Criminal Defense Lawyers and Louis Natali, Esq., Supporting Appellants. We are grateful to amici for their careful reasoning and research. Their brief was thorough and expertly written; more, it was genuinely helpful.

[19] As we reference below, the precise holding of the Pennsylvania Supreme Court was that "[n]either the jury instructions, the jury poll nor the verdict slips in the instant matter contained language which would violate the dictates of *Mills*." *Banks II*, 656 A.2d at 470.

Pennsylvania Supreme Court's application of *Mills* should be disturbed under the AEDPA standards.[20]

(c) The Pennsylvania Supreme Court's Application of Mills

We disagree with the District Court's refusal to address how the Pennsylvania Supreme Court applied *Mills* in *Banks II*. We do, however, agree with the District Court that, in any event, our analysis would not be dictated by *Frey* -- which was pre-AEDPA -- but by the AEDPA standard. Thus, we must ask whether the Pennsylvania Supreme Court determination regarding the constitutionality of the instructions, verdict slip, and polling of the jury involved an unreasonable application of *Mills*.

The Pennsylvania Supreme Court relied on its own precedents to conclude that the sentencing proceedings in Banks did not violate *Mills*, dismissing each of Banks's contentions in turn. "This [jury] instruction, which mirrors the language found in the death penalty statute of our Sentencing Code, has previously been reviewed by this Court and determined not to violate *Mills*." *Banks II*, 656 A.2d at 470. "The form of verdict slip employed in the instant matter was virtually identical to that considered by this Court in

[20] The District Court never really addressed this issue because it concluded that neither *Mills* nor *Frey* should apply. However, since the parties have extensively briefed the issue before us, we will address it and decide it, rather than remanding to the District Court. *Hein v. FDIC*, 88 F.3d 210, 221(3d Cir.1996), *cert. denied sub nom. Hein v. McNeil*, 519 U.S. 1056, 117 S.Ct. 683, 136 L.Ed.2d 608 (1997) ("To the extent that we can decide these issues as a matter of law without further factual development, we serve the interests of judicial economy as well as the interests of the parties in avoiding unnecessary re-litigation.")

Commonwealth v. Frey and determined not to infer to the jury a requirement of unanimity with respect to mitigating circumstances." *Id.* (Citation omitted). "Nor do the answers provided by the individual jurors during the poll suggest in any manner that they believed unanimity was required in finding mitigating circumstances." *Id.* The court then concluded, "In sum, neither the instructions of the court nor the printed instructions on the verdict slips nor the questions and responses of the court and jury during polling, standing alone or viewed in total, infer a requirement of unanimity which would violate the dictates of *Mills*." *Id.* at 471.

Consistently, the Pennsylvania Supreme Court relied on its own prior determinations in upholding Banks's sentencing proceedings. Our task is to review state court proceedings not to ensure the consistency of the Pennsylvania Supreme Court's application of its law, but, rather, to assure proper application of United States Supreme Court teachings. In *Williams v. Taylor*, the Supreme Court approvingly quoted the Seventh Circuit:

> Section 2254(d) requires us to give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law 'as determined by the Supreme Court of the United States' that prevails.

24 529 U.S. at 387, 120 S.Ct. 1495 (*quoting Lindh v. Murphy*, 96 F.3d 856, 869 (7th Cir. 1996)).

The United States Supreme Court has provided ample guidance in this area. There are two overarching themes in *Mills* that are further clarified in *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), *reh'g denied* 495 U.S. 924, 110 S.Ct. 1961, 109 L.Ed.2d 322.

First, if under the sentencing scheme it is possible for jurors to agree that mitigating circumstances exist, but, because of a lack of unanimity as to which mitigating circumstances exist, to conclude that they may not consider those circumstances, the sentencing scheme is unconstitutional. *Mills*, 486 U.S. at 374, 108 S.Ct. 1860. Second, and related to the first, the critical question is not whether a constitutional construction is possible, but whether a reasonable jury could have interpreted the instructions in an unconstitutional manner, that is, as restricting them to finding only those mitigating circumstances as to which all can agree. *Id.* at 375-76, 108 S.Ct. 1860. We conclude that the Pennsylvania Supreme Court failed to analyze the penalty phase of Banks's trial in accordance with these principles, and, as a consequence, unreasonably applied *Mills*. As Judge Padova recently pointed out in granting habeas relief in a very similar case, *Hackett v. Price*, 2001 WL 884721 (E.D.Pa. Aug. 6, 2001), the state court

> misconstrue[d] the court's task in examining for *Mills* error by focusing on the meaning of the statute rather than on the issue of jury confusion. As *Mills* instructs, it is the danger of jury misinterpretation of the statutory scheme, rather than the existence of a constitutional interpretation of the statute by the courts, that creates the *Mills* problem.

Id. at *19.

We must conclude that the Pennsylvania Supreme Court ruling involved an unreasonable application of *Mills*.[21]

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[21] Banks argues that, in fact, the determination was "contrary to" *Mills*, because it violated *Mills*' dictates. We think the better

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In fact, we conclude that the Pennsylvania Supreme Court ruled that there was no *Mills* violation without ever really applying the teachings of *Mills*, and by examining the statute, not the potential for confusion by jurors in what they were told to do. Further, as noted in *Hackett*, *Mills* itself involved a situation in which the statute had been interpreted to be constitutional, but the Supreme Court vacated the sentence based on the risk of confusion. *Id.* at 19.

We will examine each aspect of the Pennsylvania Supreme Court's analysis of the jury's involvement in the penalty phase -- the instructions themselves, the verdict slip, and the polling of the jury following the sentencing verdict.

i. Jury Instructions

In *Banks II*, the Pennsylvania Supreme Court quoted three lines of the jury instructions:

> The sentence you impose will depend upon your findings concerning aggravating and mitigating circumstances. The Crime[s] Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances. The verdict must be a sentence of life imprisonment in all other cases.

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analysis, since the Pennsylvania Supreme Court referenced *Mills* and seemed to be considering how it impacted the Banks case, is to rely on the "unreasonable application," which, in any event, is clearly evident.

656 A.2d at 470.

The court then opined that because the instruction "mirrors the language found in the death penalty statute of our Sentencing Code [that] has previously been reviewed by this court and determined not to violate Mills" Banks's claim was "without merit." *Id.*[22] (*citing Commonwealth v. Hackett*, 534 Pa. 210, 627 A.2d 719 (1993); *Commonwealth v. Marshall*, 534 Pa. 488, 633 A.2d 1100 (1993), *rearg. denied* (1994); *Commonwealth v. O'Shea*, 523 Pa. 384, 567 A.2d 1023 (1989), *cert. denied*, 498 U.S. 881, 111 S.Ct. 225, 112 L.Ed.2d 180 (1990)).

In *Hackett*, the Pennsylvania Supreme Court had attempted to distinguish *Mills* based on the Maryland statute, reasoning that since the Maryland statute barred consideration of mitigating evidence unless there was unanimous agreement and the Pennsylvania statute required unanimity as to the absence of a mitigating circumstance, the Pennsylvania statute allowed individual jurors to prevent death sentences but not to compel them. *See Hackett*, 2001 WL 884721 at *19. The differences in the statutes were not enough to render the Pennsylvania statute constitutional, since the danger of jury misinterpretation was present in both statutes, and the Pennsylvania Supreme Court had examined only the statute, not the possibility that the jury had been confused by the instructions given. *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), *reh'g denied* 495 U.S.

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22 *Hackett*, as noted above, was recently vacated by the Eastern District of Pennsylvania. *See* 2001 WL 884721. Post-conviction relief was denied in *O'Shea* in 1999 at 556 Pa. 6, 726 A.2d 376, *cert. denied*, 528 U.S. 1119, 120 S.Ct. 941, 145 L.Ed.2d 818 (2000).

924, 110 S.Ct. 1961, 109 L.Ed.2d 322, established that the jury instructions must be considered in the context of the entire proceeding, and the Pennsylvania Supreme Court's failure to do so was contrary to clearly established federal law. *Id.* at 21. Here, the Pennsylvania Supreme Court has essentially ignored the teachings of *Boyde* and engaged the same reasoning regarding the constitutionality of the instructions as in *Hackett* -- itself constitutionally defective.

Proper application of *Mills* requires at the outset that the reviewing court examine the entire jury instructions, posing the "critical question" whether a reasonable jury could have concluded from the instruction that unanimity was required to find a mitigating circumstance. *Mills*, 486 U.S. at 370, 108 S.Ct. 1860. Also, the Boyde standard requires that the court view the instruction in its totality, not examine in isolation a few sentences that reference the Crimes Code. *Boyde*, 494 U.S. at 378, 110 S.Ct. 1190.

In *Boyde*, the Supreme Court iterated the standard of evaluating jury instructions as "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence," *Id.* at 380, 110 S.Ct. 1190, and it reiterates the *Mills* principle that jury instructions must be carefully considered in their entirety. *Mills*, 486 U.S. at 384, 108 S.Ct. 1860. "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Boyde*, 494 U.S. at 378, 110 S.Ct. 1190. In *Banks II*, the Pennsylvania Supreme Court never examined the jury instruction from that vantage point. Rather, it looked at one part of the instruction and found that it was acceptable because it tracked the permissible statutory provisions and did not "infer" a requirement of unanimity. 656 A.2d at 470. Its conclusion was based not on how a

juror might interpret its content, but on its own previous statutory construction of the language at issue. Here, even more starkly than in *Hackett*, the Pennsylvania Supreme Court merely stated that the statutory language had been reviewed and "determined not to violate Mills." *Banks II*, 656 A.2d at 470. There was no further analysis.

We will juxtapose the instructions given by the trial court with those we found in *Frey* to be constitutionally defective.

Frey Instructions

Members of the jury, you must now decide whether this defendant should be sentenced to death or life imprisonment. The sentence will depend on your finding concerning aggravating and mitigating circumstances. The Crimes Code provides that the verdict must be a sentence of death if the jury unanimously finds one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life in all other cases.

Banks Instructions

Members of the jury, you must now decide whether the defendant in this case is to be sentenced to death or to life imprisonment on each of the Informations upon which you have returned a verdict of guilty of murder in the first degree.

The sentence you will impose will depend on your findings concerning aggravating and mitigating circumstances. The Crimes Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstances, or if the jury unanimously finds

Frey v. Fulcomer, 132 F.3d 916, 922 (3d Cir. 1997), *cert. denied*, 524 U.S. 911, 118 S.Ct. 2076, 141 L.Ed.2d 151 (1998).

Remember that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstances (sic) and no mitigating circumstances, or if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment. *Id.*

Now, the Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt . . . The defendant has the burden of proving mitigating circumstances but only by a preponderance of the evidence. *Id.* at 923.

one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances.

Remember, under the law of this Commonwealth, your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstance, or if you unanimously find one or more aggravating circumstances which then outweigh any mitigating circumstances.

In all other cases, your verdict would be life imprisonment.

Once again, the Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. The defendant has the burden of proving mitigating circumstances by a preponderance of the evidence.

If, after conscientious and thorough deliberations, you are unable to agree on your findings and your verdict, you should report that to me.

While, as we have noted, *Frey* does not control our holding here, nonetheless our reasoning there regarding the *Mills* implications of a very similar jury charge is instructive and applicable.[23] As we said in *Frey*:

> Specifically, we must determine whether it is reasonably likely that the jury could have understood the charge to require unanimity in consideration of mitigating evidence. We need not determine whether the jurors *did*, in fact, understand the charge to require unanimity in consideration of mitigating evidence-only whether it was reasonably likely. *See Boyde*, 494 U.S. at 380, 110 S.Ct. at 1197-98; *Mills*, 486 U.S. at 384, 108 S.Ct. at 1870.
>
> Examining the language of the jury charge, we must answer in the affirmative. First and foremost, read in its entirety, the relevant portion of the jury charge emphasizes the importance of a unanimous finding, using the phrase frequently and in close proximity to -- within seven words of -- the mitigating circumstances clause. We describe the relevant portion of the sentence: "if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance. . . ." Considering this close proximity -- the clause is, to the ear and to the mind, one sound bite -- it is quite possible that a juror would, regardless of other qualifying language, believe that

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[23] In his brief Banks sets out the jury instruction in *Frey* alongside those given here, and notes that the instruction given here was even more egregious than in *Frey* in terms of its import regarding the need for the jurors to "agree" on their" findings." We agree.

> mitigating circumstances had to be found unanimously.
>
> * * *
>
> Thus, the unanimity language in the Frey charge could only modify the term "find," and hence the jury could reasonably have believed that unanimity was required in *both* its ultimate and interim conclusions, especially given the close proximity we have described.
>
> * * *
>
> Other parts of the Frey charge were more likely to increase the confusion rather than lessen it. As in *Zettlemoyer*, the Frey trial court made a point of instructing the jury on the relevant burdens of proof relating to both aggravating and mitigating circumstances.
>
> * * *
>
> [But] Unlike *Zettlemoyer*, where the court specifically instructed the jury that aggravating circumstances must be proven "unanimously, beyond a reasonable doubt," the trial court here did not stress that the different burdens that attach to aggravating and mitigating circumstances also entail different unanimity requirements. A lay jury might plausibly conclude, therefore, that aggravating *and* mitigating circumstances must be discussed and unanimously agreed to, as is typically the case when considering whether a burden of proof has been met. Such an understanding, however, is plainly inconsistent with the requirements of *Mills*, and adds to our concern that the jury could have understood the charge to require unanimity in consideration of mitigating evidence.

132 F.3d at 923-24.

These same concerns dictate the same result here. The instruction here, like the one we examined in *Frey*, runs afoul of *Mills*, and the Pennsylvania Supreme Court's assessment of the instruction involved an unreasonable application of *Mills*. The instructions are in themselves ambiguous, allowing for a jury to infer that the requirement of unanimity applies both to aggravating and mitigating circumstances. There is no way that a juror would understand that a mitigating circumstance could be considered by less than all jurors. Further, when the judge clarified the difference between aggravating and mitigating circumstances, he described the requirements for finding aggravating circumstances and then said:

> The defendant has the burden of proving mitigating circumstances by a preponderance of the evidence. The preponderance of the evidence is a lesser burden of proof than beyond a reasonable doubt. A preponderance of the evidence exists where one side is more believable than the other or, as has been explained to you, a preponderance exists whenever the scales tip ever so slightly.

A reasonable juror could readily infer from the fact that the distinctions between the burden of proof were explained, but no mention was made of a distinction between a requirement of unanimity for a finding of aggravating circumstances and the requirement for mitigating circumstances, that the same requirement of unanimity applied. The Banks court went on to stress:

> Remember, again, your verdict in each case must be unanimous. It cannot be reached by a majority vote or by any percentage. It must be the verdict of each and every one of you.

Considered as a whole, the jury instructions leave no doubt that "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380, 110 S.Ct. 1190.

ii. Verdict Slip

In its review of the verdict slip, the Pennsylvania Supreme Court noted that the form of slip used was "virtually identical to" the one the court had considered in *Commonwealth v. Frey* and had "determined not to infer to the jury a requirement of unanimity with respect to mitigating circumstances." *Banks II*, 656 A.2d at 470. It therefore rejected as "unfounded" Banks's claim that the verdict slip "impermissibly suggested to the jury that it must find mitigating circumstances by unanimous vote." *Id.*

The Pennsylvania Supreme Court then reviewed the poll by the foreman but determined that, because both the oral instructions and the instructions on the verdict slip were proper, the situation was distinguishable from *Commonwealth v. Young*, 524 Pa. 373, 572 A.2d 1217 (1990), *resentencing after remand aff'd*, 36 Conn.App. 516, 651 A.2d 1313 (1993), *cert. denied*, 511 U.S. 1012, 114 S.Ct. 1389, 128 L.Ed.2d 63 (1994), in which the court had remanded for resentencing a case in which the oral instructions were inconsistent with the verdict sheet. *See Banks II*, 656 A.2d at 471. In *Young*, the jury charge required a sentence of death if "the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances." *Young*, 572 A.2d at 1228. The verdict sheet, however, indicated that "We, the jury,

unanimously find that the defendant has proven the following mitigating circumstances by a preponderance of the evidence." *Id.* (Emphasis in original). The Pennsylvania Supreme Court found that "[t]his inconsistency requires a remand of this case for resentencing. . . ." *Id.* In contrast, in *Banks II*, the Pennsylvania Supreme Court found nothing in the verdict slip questions, or the jurors' responses, that would "indicate they believed they had to find mitigating circumstances unanimously." 656 A.2d at 471.

But, again, the court undertook a different inquiry from that required under *Mills*. *Mills* requires a court to assess whether a need for a unanimous finding of mitigating circumstances is one that "a reasonable jury could have drawn from . . . the verdict form employed." *Mills*, 486 U.S. at 375-76, 108 S.Ct. 1860.

Here, we cannot help but find that a reasonable juror could so conclude. In fact, we believe the form itself *does* suggest the need for unanimity. The verdict form is a three-page document, containing two "numbered" statements:

> 1. We the jury unanimously sentence the defendant in the above matter to
>
> X Death
> ___ Life Imprisonment
>
> 2. (To be completed if the Sentence is Death) ***We the jury have found unanimously*** (emphasis added)
>
> ___ At least one aggravating circumstance and no mitigating circumstances. The aggravated circumstance(s) (is)(are):

> 1. ___ In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.
>
> 2. ___ The defendant has a significant history of felony convictions involving the use or threat of violence to the person.
>
> 3. ___ The defendant has been convicted of another federal or state offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.
>
> *Or*
>
> X One or more aggravating circumstances which outweigh any mitigating circumstance or circumstances.
>
> The aggravating circumstance(s) (is)(are):
>
> > 1. ___ In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.
> >
> > 2. ___ The defendant has a significant history of felony convictions involving the use of threat of violence to the person.

3. X The defendant has been convicted of another federal or state offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

The mitigating circumstance(s) (is)(are):

1. X The defendant was under the influence of extreme mental or emotional disturbance.

2. ___ The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

3. ___ Any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense.

Each form was marked as shown above and signed by the foreperson of the jury.

We find it only reasonable to conclude that the form itself is at least confusing, and more likely suggestive, regarding the need for unanimity as to mitigating circumstances. The lead-in language to the overarching second question is "We the jury have found unanimously. . . ." By implication, everything that follows was found unanimously. What follows is a reference both to aggravating and to mitigating circumstances, with no additional language that would imply that there is a different standard for aggravating

circumstances than there is for mitigating circumstances. There is also no language anywhere on the form from which the jury could infer that a mitigating circumstance might be marked if only one juror had found that circumstance to exist.

Thus, the structure and form of the verdict slip itself runs afoul of the dictates of Mills. Further, for the Pennsylvania Supreme Court to have ruled that there was no Mills violation without an examination of the content and implications of the verdict slip and without employing the proper inquiry was an unreasonable application of Mills.

iii. Jury Poll

Of the three elements -- the instructions, the verdict slip, and the jury poll -- the Pennsylvania Supreme Court opinion devoted the greatest attention to the polling of the jury, actually quoting the trial court's words. The polling questions and answers never used the term "unanimous" regarding the verdict or the finding of any of the aggravating or mitigating circumstances. While the jurors were asked whether they each found the "same" circumstances as the ones referred to before, it is difficult to say whether the questions were confusing in this regard. We do agree with the Pennsylvania Supreme Court in its view that the polling of a jury can compound the problem created by a questionable charge or verdict slip, as was the case in *Young*. *Banks II*, 656 A.2d at 471. Here, the polling does not appear either to add to or reduce the confusion as to the *Mills* problems we have already identified in the penalty phase instructions and verdict slip.

C. CONCLUSION

Because the Pennsylvania Supreme Court ruling regarding the application of *Mills* to the penalty phase instruction and verdict slip in Banks's trial was unreasonable, habeas relief will be granted and we will REVERSE the Order of the District Court and instruct it to GRANT a provisional writ of habeas corpus directed to the penalty phase. The Commonwealth of Pennsylvania may conduct a new sentencing hearing in a manner consistent with this opinion within 120 days of this Order, or shall sentence Banks to life imprisonment.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

GEORGE E. BANKS, Petitioner	:	NO. 4:CV-99-0438
v.	:	(Jugde McClure)
MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; JAMES E. PRICE, Superintendent of State Correctional Institution at Greene: and RAYMOND COLLERAN, Superintendent of State Correctional Institute at Waymart; COMMONOF PENNSYLVANIA, Respondents	:	

ORDER

FILED: September 16, 1999

BACKGROUND:

On March 22, 1999, petitioner George E. Banks, an inmate at the State Correctional Institution at Waymart, Wayne County, Pennsylvania, commenced this action with the filing of a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Banks was convicted in 1983 of twelve counts of first-degree murder, one count of third-degree murder, one count of attempted murder, and one count of robbery. Twelve consecutive sentences of death, plus a consecutive sentence of 25 to 50 years total incarceration,

were imposed by the Court of Common Pleas of Luzerne County, Pennsylvania.

Banks has been granted leave to proceed *in forma pauperis*, counsel has been appointed, and a stay of a previously scheduled execution has issued.

On March 31, 1999, on initial review under Rule 4 of the Rules Governing Section 2254 Cases in the U.S. District Courts, 28 U.S.C. following § 2254, we issued a rule to show cause why four of Banks' claims should not be dismissed as procedurally barred. By Memoraum and Order of Court dated May 7, 1999, we dismissed those four claims as procedurally barred. *See Banks v. Horn*, 49 F. Supp. 2d 400 (M.D. Pa. 1999). Banks withdrew a claim in his brief in support of the petition. On August 18, 1999, we issued a memorandum and order denying the petition. *Banks v. Horn*, 1999 WL 636595 (M.D. Pa. Aug. 18, 1999).

Before the court is Banks' motion for reconsideration of the latter memorandum and order.

DISCUSSION:

I. STANDARD

"The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985) (citations omitted), *cert. denied*, 476 U.S. 1171 (1986). "Therefore, a court may properly grant a party's motion for reconsideration in any of the following circumstances: '(1) the development of any intervening change in the law, (2) the emergence of new evidence not previously available, or (3) the need to correct a clear error of law or

prevent a manifest injustice.'" *In re TMI Litigation Cases Consolidated II*, 922 F. Supp. 997, 1008 (M.D. Pa. 1996) (Rambo, then C.J.; quoting *Cohen v. Austin*, 869 F. Supp. 320, 321 (E.D. Pa 1994); citations omitted in *In re TMI*). The granting of a motion to reconsider is an extraordinary remedy and a court should not do so when the motion is merely a re-styling or rehash of issues previously presented. *McConocha v. Blue Cross and Blue Shield Mutual of Ohio*, 930 F. Supp. 1182, 1184 (N.D. Ohio 1996). A court should consider neither new evidence nor a new legal theory which could have been presented on the original motion, taking into account due diligence. *Id.* Mere disagreement with the court is a ground for an appeal, not a motion for reconsideration. *Id.*

II. ISSUE AS TO WHICH RECONSIDERATION IS SOUGHT

The issue as to which Banks seeks reconsideration is the ground of relief numbered (6) in his petition:

> The trial court's instructions to the jury in the sentencing phase, the verdict slip, and the jury poll required the jury to unanimously find both aggravating and mitigating circumstances in violation of the defendant's Eighth Amendment right to protection from cruel and unusual punishment.

See 1999 W.L. 636595 at *1. The principle underlying this claim is the holding of *Mills v. Maryland*, 486 U.S. 367 (1988). *See also McKoy v. North Carolina*, 494 U.S. 433 (1990).

In *Frey v. Fulcomer*, 132 F.3d 916, 924 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 2076 (1998), the Third Circuit

reviewed a jury charge similar to that challenged by Banks and concluded that it violated the rule of *Mills*. In our previous memorandum, we concluded that *Frey* does not apply because it involved a petition filed before the amendments to § 2254 under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214.[1] Under AEDPA, habeas relief is warranted if the state court decision resulted in a decision that was contrary to, or involved an unreasonable application of clearly established precedent of the Supreme Court of the United States. 1999 WL 636595, at *16 (citing 28 U.S.C. § 2254(d)(1)[]). Since *Mills* was decided in 1988, and Banks was convicted in 1983, we concluded that the rule of *Mills* was not clearly established at the time that the state court made its ruling on the issue.

III. REVIEW OF THE ISSUE

Banks may be correct, at least in part, as to the time of the state court decision. The applicable statutory provision reads:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in

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[1] We held that the standards recited in AEDPA govern Banks' petition. Banks argued that because he filed a petition before AEDPA became effective (that petition was dismissed as a mixed petition as directed by the Third Circuit), pre-AEDPA standards governed the instant petition. The Third Circuit since has held that AEDPA governs in such circumstances. *Hull v. Kyler*, No. 97-7551, slip op. at 22-24 (3d Cir. filed Aug. 23, 1999).

> State court proceedings unless the adjudication of the claim --
>
> > (1) resulted in a decision that was contrary to or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;
> >
> > . . .

28 U.S.C. § 2254(d)(1).

The question is the time at which the federal law must have been clearly established, at the time of the "adjudication" or the time of the "decision." An attempt to answer this question involves opening a can of worms, and those worms are remarkably squiggly.

One reading of this language would lead one to conclude that the "decision" is the holding after "adjudication on the merits" of the constitutional issue, meaning that the time of the "decision" would be the same as the time that the "adjudication on the merits" is complete. However, one also can read "decision" to mean the final judgment. Given the overall purpose of AEDPA to limit the scope of federal review of the final judgments of state courts, this reading becomes more reasonable.

Yet another reading of "decision" is the ruling made by the first court considering the issue at the time it must be raised. In this instance, that could be the trial judge's ruling on the jury charge, verdict slip, and jury poll; if an erroneous ruling at that time constitutes plain error, it could be (again) the time the judgment becomes final.

This case is an example of why one of these alternate readings of "decision" is reasonable. The issue was not raised in the state courts (via PCRA petition) until February of 1989. *Commonwealth v. Banks*, 656 A.2d 467, 469 (Pa. 1995) (citations for subsequent history omitted). The Supreme Court of Pennsylvania ruled on the issue in 1995. *Id.* at 470-472. Yet Banks' argument brings the applicable time frame forward twelve years from the time that the trial court should have been presented with the issue and eight years after the judgment became final by the denial of *certiorari* by the Supreme Court of the United States.

Complicating this analysis is whether an erroneous holding in 1995 would mean that the sentence of death in 1983 violated the Constitution. That is, the Supreme Court decided *Mills* in 1988, after Banks' judgment became final. *Mills* therefore would mean that Banks' sentence was unconstitutional only if *Mills* was retroactive. Thus, the Supreme Court of Pennsylvania's application of *Mills*, if erroneous, would not necessarily render the sentence unconstitutional.

Fortunately, we need not immerse ourselves in the squiggly worms. As we noted, 1999 WL 636595 at *17, *Mills* does not require an outcome different from that reached by the state courts. Since a number of courts have ruled that language substantially similar (in some cases, nearly identical) to that used in the challenged jury instruction, does not violate the rule of *Mills*, we concluded that the state courts' decision was not an unreasonable application of Supreme Court precedent. 1999 WL 636595 at *15-*16.

Banks cites *Jermyn v. Horn*, 1998 WL 754567 (M.D. Pa. Oct. 27, 1998) (Caldwell, J.; currently before the Third Circuit); as conflicting with our decision. He is correct, but again, only to a certain extent. In that case, reviewing

language substantially similar to that involved in this case, Judge Caldwell concluded that the respondents had not persuaded him that the state court adjudication was a reasonable application of *Mills* and *McKoy*. *Jermyn* at *45. However, he also noted:

> The respondents maintain that the state supreme court's decision is a reasonable application of United States Supreme Court law in this area. However, they cite no Supreme Court precedent dealing with the jury instructions at issue nor do they cite cases from other Circuits that might be contrary to the Third Circuit's decision in *Frey*.

Id. at *44. In this case, we have cited (albeit as products of our own research) a number of such opinons.[2] Otherwise, we join the Supreme Court of Pennsylvania and the other courts we cited on the issue and simply disagree with Judge Caldwell on the issue.

In short, the motion for reconsideration will be denied, since it reflects disagreement with our holding, not a change in the law, new evidence, or plain error of law.

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[2] One case cited by Judge Caldwell for purposes of the issue of retroactivity is *DeShields v. Snyder*, 829 F. Supp. 676 (D. Del. 1993), which the Third Circuit called a "thoughtful opinion" in *Frey*. *Jermyn* at *37 (citing *Frey* at 920 n. 4). *DeShields* is one of the opinions we cited as having a similar instruction as the one at issue in this case.

NOW, THEREFORE, IT IS ORDERED THAT petitioner George E. Banks' motion (record document no. 26) for reconsideration is denied.

/s/
James F. McClure, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

GEORGE E. BANKS, Petitioner	:	NO. 4:CV-99-0438
v.	:	
MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; JAMES E. PRICE, Superintendent of State Correctional Institution at Greene: and RAYMOND COLLERAN, Superintendent of State Correctional Institute at Waymart; COMMON-OF PENNSYLVANIA, Respondents	:	

MEMORANDUM

McCLURE, District Judge — August 18, 1999

BACKGROUND:

On March 22, 1999, petitioner George E. Banks, an inmate at the State Correctional Institution at Waymart, Wayne County, Pennsylvania, commenced this action with the filing of a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. According to the petition, Banks was convicted in 1983 of twelve counts of first-degree murder, one count of third-degree murder, one count of attempted murder, and one count of robbery. Twelve consecutive sentences of death, plus a consecutive sentence of 25 to 50 years

total incarceration, were imposed by the Court of Common Pleas of Luzerne County, Pennsylvania.

Banks has been granted leave to proceed *in forma pauperis*, counsel has been appointed, and a stay of a previously scheduled execution has issued.

On March 31, 1999, on initial review under Rule 4 of the Rules Governing Section 2254 Cases in the U.S. District Courts, 28 U.S.C. following § 2254, we issued a rule to show cause why four of Banks' claims should not be dismissed as procedurally barred. By Memorandum and Order dated May 7, 1999,[1] we dismissed those four claims as procedurally barred. In his brief, Banks has withdrawn his eighth claim. Brief in Support of Petition for Writ of Habeas Corpus at 14.

The remaining grounds for relief asserted by Banks, numbered as in the petition, are:

(1) The defendant did not effect a knowing, intelligent and voluntary waiver of his Sixth Amendment right to assistance of counsel.

(2) The defendant was not competent to waive his Sixth Amendment right to assistance of counsel.

(3) The defendant did not effect a knowing, intelligent and voluntary waiver of his Fifth Amendment right against self-incrimination.

(4) The defendant was not competent to waive his Fifth Amendment right to protection from self-incrimination.

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[1] To be published as *Banks v. Horn*, 49 F.Supp.2d 400 (M.D.Pa.1999), and currently available at 1999 WL 288531.

(5) The defendant was not competent to be tried, convicted and sentenced to death.

(6) The trial court's instructions to the jury in the sentencing phase, the verdict slip, and the jury poll required the jury to unanimously find both aggravating and mitigating circumstances in violation of the defendant's Eighth Amendment right to protection from cruel and unusual punishment.

(10) Pennsylvania's proportionality review statute deprives a defendant of due process of law under the Fourteenth Amendment.

The parties were provided with a briefing schedule, and all briefs have been submitted. The matter is now ripe for disposition.

Banks also has filed a motion to amend the petition to add a claim that he is not competent to be executed. The motion will be denied because, as Banks himself notes, it is not ripe for adjudication. Also, the claim has not been exhausted. The claim therefore is subject to dismissal and amendment would be futile. The motion to amend the petition will be denied.

DISCUSSION:

I. STATEMENT OF FACTS[2]

On the evening of September 24, 1982, Banks attended a birthday party in Wilkes-Barre. He was accompanied to the party by two girlfriends, and a third girlfriend was in attendance as well. Banks was at the party from approximately 9:00 until about 10:30 p.m. Between midnight and 1:00 a.m. of September 25, 1982, Banks called the location of the party and spoke to one of his girlfriends, Dorothy Lyons. Lyons was visibly upset by the call and left the party, accompanied by the last of Banks' girlfriends still in attendance. She took with her an AR-15 rifle belonging to Banks, apparently at Banks' request. The Colt AR-15 rifle is a military style, semi-automatic weapon, a civilian version of the M-16 used by American servicemen.

Shortly after 1:00 a.m., Banks was seen at a complex in which Lyons had an apartment. He was carrying a bag containing several small boxes, and commented to the witness who saw him that he (the witness) should not surprise people because he might get shot.

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[2] This summary of the facts is that set forth in an earlier memorandum, when this case was before this court initially. *Banks v. Horn*, 939 F.Supp. 1165, 1169-1170 (M.D.Pa. 1996). We repeat the statement because, obviously, the facts have not changed. A more thorough recitation of the facts is set forth in the first opinion of the Supreme Court of Pennsylvania in this matter. *Commonwealth v. Banks*, 513 Pa. 318, 324-335, 521 A.2d 1, 3-9 (1987). This case has a complicated procedural history, recited below. For the sake of simplicity, subsequent history is not provided in citations to prior related opinions.

Banks was next seen on Schoolhouse Lane in Wilkes-Barre by a group of young people on the street. (Although referred to as "teenagers" by the Supreme Court of Pennsylvania, only one of the members of this group can have been a teenager at the time of the shootings. The two victims were aged 23 and 24, and a woman who was not shot was 21 at the time of trial. The remaining person present (a man) was 20 at the time of trial.) Banks owned a home at 28 Schoolhouse Lane in which noises like gunshots were heard by the youths at about 2:00 a.m. Banks appeared on the street wearing coveralls which witnesses consistently described as appearing to be of a military appearance. One of the youths stated that he knew Banks, to which Banks responded that he was "not going to live to tell anybody about this," and shot two of the youths. One of them survived but the other was pronounced dead later that morning.

When police were summoned to the scene, they called for an ambulance. Also, they were told about the sound of gunfire from 28 Schoolhouse Lane and went there to investigate. Inside they found the lifeless bodies of the three girlfriends of Banks who had been at the party as well as their five children, four of whom were fathered by Banks. All had gunshot wounds.

Banks was next seen in the vicinity of a lounge called the Cabaret. Two men were in their cars talking when Banks approached, in the same outfit, and pointed the AR-15 at the head of one of the men. Banks demanded that the man move over and got into the car. Banks let the owner out after a short distance but left with the car.

At about 2:30 a.m. shots were heard at the Heather Highlands Trailer Park in Jenkins Township, Luzerne County. Two boys present in one of the trailers described

how Banks entered the trailer and grabbed Sharon Mazzillo (another girlfriend) with one arm while holding the AR-15 in the other. Banks said something like, "I shot some of my family, now I'm going to shoot some of yours." He then shot his son by Sharon, Kissmayu Banks, who was asleep on the couch. Sharon and her mother, Alice Mazzillo, then tried to push Banks out of the trailer, and Alice went to the bedroom to call police. Banks shot Sharon as she tried to run out the door of the trailer. Banks next choked, shot and kicked Scott Mazzillo, then struck him with the butt of the rifle. Finally, Banks shot Alice and left. One of the two boys left alive by Banks lifted the phone from Alice's body and completed the call to the police.

Banks later was tracked to his mother's home, but left before police arrived. Eventually, Banks was located in the home of a friend, having barricaded himself inside. Police surrounded the house but did not enter since Banks still had the AR-15 and was suspected of having hand grenades. Police tried to convince Banks that his children were still alive and needed his help. After more than four hours, Banks was talked out of the house and taken into custody. He made numerous statements admitting to the shootings.

Explaining conduct like that of Banks probably can never be done adequately. At trial, the Commonwealth took the position that Banks was motivated by a fear that he was losing control over his "family." Defense counsel presented psychiatric experts who testified that Banks suffered from paranoid psychosis. Succinctly stated, the experts testified that Banks, who is biracial, believed that he was the victim of a racist conspiracy. There was evidence also that Banks had made statements to the effect that he did not want his children to grow up in a racist world, and killed them to save them from suffering the effects of racism as Banks had.

II. PROCEDURAL HISTORY

As indicated above, *see* Note 2, this case has been before this court previously. To place the matter into context, since the resolution of Banks' claims is affected, we will provide a procedural history of the case. A chronology of some of the more important events of this case is appended to this opinion as Court's Appendix I.

After Banks was convicted in the Court of Common Pleas of Luzerne County, he pursued a direct appeal to the Supreme Court of Pennsylvania, which affirmed. *Commonwealth v. Banks*, 513 Pa. 318, 521 A.2d 1 (1987) (*Banks I*). The Supreme Court of the United States denied a petition for certiorari. *Banks v. Pennsylvania*, 484 U.S. 873, 108 S.Ct. 211, 98 L.Ed.2d 162 (1987). Banks then sought post-conviction, collateral relief in the Court of Common Pleas under the Pennsylvania Post Conviction Hearing Act which was considered under the Post Conviction Relief Act (PCRA), 42 Pa.Cons.Stat.Ann. §§ 9541 et seq., which had become effective; the denial of relief was affirmed by the Supreme Court of Pennsylvania. *Commonwealth v. Banks*, 540 Pa. 143, 656 A.2d 467 (1995) (*Banks II*). The Supreme Court of the United States again denied a petition for certiorari. *Banks v. Pennsylvania*, 516 U.S. 835, 116 S.Ct. 113, 133 L.Ed.2d 65 (1995).

After Pennsylvania Governor Thomas Ridge signed a death warrant for execution during the week of March 3, 1996, Banks filed with this court, *inter alia*, a motion to stay execution. We granted that motion and Banks filed a petition for a writ of habeas corpus under § 2254. We denied a motion to dismiss the petition as a mixed petition, finding that unexhausted claims were procedurally barred in the Pennsylvania courts. *Banks v. Horn*, 928 F.Supp. 512

(M.D.Pa. 1996) (*Banks III*). *See also Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982) (mixed petition is one with both exhausted and unexhausted claims, and must be dismissed); *Toulson v. Beyer*, 987 F.2d 984 (3d Cir. 1993) (if unexhausted claims are procedurally barred in state court, district court must dismiss unexhausted claims and consider merits of exhausted claims, but state law must clearly foreclose consideration of unexhausted claims). We then considered the merits of Banks' remaining claims and denied the petition. *Banks v. Horn*, 939 F.Supp. 1165 (M.D.Pa. 1996) (*Banks IV*).

The Third Circuit reversed and remanded for dismissal of the petition as mixed, finding that Pennsylvania law did not clearly foreclose consideration of the unexhausted claims. *Banks v. Horn*, 126 F.3d 206 (3d Cir. 1997) (*Banks V*). While the case was pending before the Third Circuit, Banks filed a second petition under the PCRA in the Court of Common Pleas, which denied relief. The Supreme Court of Pennsylvania affirmed the denial of relief, not for the reasons recited by the Court of Common Pleas, but instead finding that the second petition was time-barred under the amended version of the PCRA. *Commonwealth v. Banks*, 726 A.2d 374 (Pa. 1999) (*Banks VI*).

After Governor Ridge again signed a death warrant, Banks brought the instant petition under § 2254, and a stay of execution again has issued. As noted above, *see* "BACKGROUND" and *Banks v. Horn*, 49 F.Supp.2d 400 (M.D.Pa. 1999) (*Banks VII*), we have dismissed four of Banks' claims as procedurally barred under state law, and the petition no longer is a mixed petition.

III. TIMELINESS

Respondents argue that Banks' petition is untimely under the one-year limitations period permitted for bringing a § 2254 petition after passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, 110 Stat. 1214. The relevant provision reads:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

According to respondents, Banks' judgment of conviction and sentence became final in 1987, when the Supreme Court of Pennsylvania affirmed on direct appeal and the Supreme Court of the United States denied certiorari. In *Burns v. Morton*, 134 F.3d 109 (3d Cir. 1998), however, the Third Circuit held that petitioners must be afforded at least one year from the effective date of AEDPA before § 2244(d)(1) will bar the petition because they did not have notice of the limitation until AEDPA's effective date. Thus, the limitations period within which Banks was required to file a petition did not begin until at least April 24, 1996.

In addition, the Third Circuit has held that the time limit established by § 2244(d)(1) is a statute of limitations subject to equitable tolling. *Miller v. N.J. State Dept. of Corrections*, 145 F.3d 616 (3d Cir. 1998).

On April 24, 1996, there were proceedings already pending in this court, and the matter went to the Third Circuit. The Third Circuit issued its opinion remanding to this court on September 19, 1997 (*Banks V*); we received a certified copy of the Third Circuit's judgment on October 17, 1997, and dismissed the action pursuant to that judgment on October 24, 1997. We think it evident that the time before October 24, 1997, is excluded from the period of limitations because a petition actually was pending in federal court during that time. The proceedings related to Banks' second

PCRA petition were pending when the Third Circuit issued its order remanding for dismissal. Those proceedings ended when the Supreme Court issued its opinion, *Banks VI*, on March 2, 1999. The instant proceedings began on March 22, 1999.

Respondents rely on *Lovasz v. Vaughn*, 134 F.3d 146 (3d Cir. 1998), in which the Third Circuit considered the tolling provision of § 2244(d)(2). Under that provision, the period during which a "properly filed" petition for collateral review is pending is not counted for purposes of § 2244(d)'s limitations period. The question becomes, then, whether the limitations period was tolled after the prior case in this court was dismissed and during the pendency of Banks' second PCRA petition, or between October 24, 1997, and March 2, 1999. More succinctly and directly stated, was Banks' second PCRA petition "properly filed"? According to respondents, it was not, because a petition must be timely to be properly filed. *Lovasz* at 147.

In our memorandum issued May 7, 1999 (*Banks VII*), we discussed the adequacy of the state grounds barring consideration of the four unexhausted claims asserted by Banks. 49 F.Supp.2d 400, 403-06. We noted that a ground is inadequate if, at the time an action must be taken by the petitioner to preserve a claim or claims, the rule is not clearly established. *Id.* at 403-04. If a rule is changed without notice to potential petitioners and bars consideration in state court of a claim which could have been considered prior to the change, such as by changing the time at which a claim must be raised after that time has passed, the ground is not adequate to

support the judgment. *Id.* at 404-05 (relying on *Ford v. Georgia*, 498 U.S. 411, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991)).[3]

There are two important points to consider in reviewing respondents' argument. First, although the statute reviewed by the Supreme Court in *Banks* VI, 42 Pa.Cons. Stat.Ann. § 9545, is captioned "Jurisdiction and proceedings," it is not entirely clear that the subsection setting forth the time limit for filing a PCRA petition and exceptions thereto is intended to be jurisdictional in nature. The first subsection states that original jurisdiction is in the Court of Common Pleas. Sec. 9545(a). The third subsection puts a limit on the jurisdiction of the state courts to issue a stay of execution, using standard jurisdictional language ("No court shall have the authority..."). Sec. 9545(c). The fourth subsection sets forth standards governing admissibility of evidence, discovery, and privilege during and relating to an evidentiary hearing. Sec. 9545(d). The latter normally are not considered jurisdictional matters

In contrast, the limitations subsection states that a petition "shall be filed within one year of the date the judgment becomes final, . . ." with certain exceptions. Sec. 9545(b)(1).[4] The subsection does not state that no court will

[3] Unlike the defendant in *Ford*, Banks had sixty days after the rule change (in the form of the amendment of the PCRA) to assert his claims. We therefore found the state grounds were adequate as a procedural bar. *Id.* at *4-*5 and *5 n. 2.

[4] The subsection reads in full:

(b) Time for filing petition --

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(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petition proves that:

(i) the failure to raise the claim previously was the result of interference with the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States or the Supreme Court of Pennsylvania, or at the expiration of time for seeking such review.

(4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether

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have the authority to entertain an untimely petition. Thus, since (1) not every subsection of the statute is jurisdictional in nature, and (2) the limitations subsection does not invoke clear language of jurisdiction, it cannot be said that § 9545(b) is necessarily jurisdictional in nature, as opposed to a statute of limitations subject to equitable tolling. *Cf. Miller* at 618 (AEDPA time limit statute of limitations subject to equitable tolling because term "jurisdiction" not used); *Calderon v. U.S. Dist. Court for C.D. of Calif.*, 128 F.3d 1283, 1288 (9th Cir. 1997) (Kozinski, J.; opinion on which Third Circuit relied in *Miller*, also finding that failure to use language of jurisdiction indicates statute of limitations subject to equitable tolling), *reh'g, reh'g en banc denied, cert. denied*, 522 U.S. 1099, 118 S.Ct. 899, 139 L.Ed.2d 884 (1998).[5] That it is entirely reasonable to conclude that § 9545(b) is a statute of limitations rather than a jurisdictional provision is reflected in *Lambert v. Blackwell*, 134 F.3d 506, 523-524 (3d Cir. 1997), in which the provision was so denominated.

The second point is that, prior to considering second petitions in the context of the amended version of the PCRA, the Supreme Court had applied a "relaxed waiver" standard for preserving issues for review in capital cases. *Banks VI* at 376 (citing *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937 (1982); *Commonwealth v. Beasley*, 544 Pa. 554,

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appointed or retained.

42 Pa.Cons.Stat.Ann. § 9545(b).

[5] The Ninth Circuit has overruled its prior opinion in *Calderon* but not for the reasons for which the Third Circuit cited the opinion. *Calderon v. U.S. Dist. Court for C.D. of Calif.*, 163 F.3d 530 (9th Cir. 1998) (en banc).

678 A.2d 773 (1996), *cert. denied*, 520 U.S. 1121, 117 S.Ct. 1257, 137 L.Ed.2d 337 (1997)). Because it found the amended version of § 9545(b) to be jurisdictional in nature, however, it declined to apply (actually, without jurisdiction, it could not apply) the relaxed waiver standard in Banks' case. *Id.*[6]

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[6] The Supreme Court of Pennsylvania cited *Commonwealth v. Peterkin*, 554 Pa. 547, 722 A.2d 638 (1998), *reargument denied*, for the proposition that, as a matter of jurisdiction, a PCRA petition must be filed within one year of final judgment. *Banks VI* at 376. While there is language in Peterkin to that effect, the holding is not altogether clear. The first reference to such a holding is the Supreme Court's recitation of the Commonwealth's position that the PCRA court lacked jurisdiction because the petition was untimely. *Id.* at 639. The next reference is the Supreme Court's quotation of § 9545(b)(1), including the caption of the section. *Id.* at 640. Finally, the Supreme Court stated, "As noted, on November 17, 1995, the General Assembly amended the PCRA to require that, as a matter of jurisdiction, a PCRA petition must be filed within one year of final judgment: . . ."; it then quoted § 9545 (b)(1), (3), again with the caption. *Id.* at 641. Otherwise, the opinion is written in terms of the statutory exceptions to the one-year limitation period and the need for finality. No explanation is provided as to why the limitation is jurisdictional as opposed to a statute of limitations (or, to use the language of the caption, why "jurisdiction" applies and "proceedings" does not). Also, the future non-applicability of any form of the relaxed waiver rule is not discussed.

We conclude from all of this that *Peterkin*, unlike *Banks VI*, is not sufficiently clear to establish the jurisdictional nature of the one-year limitation rule to end the equitable tolling of Banks' limitations period. Even if it did, of course, since *Peterkin* was issued December 21, 1998, with reargument denied February 17, 1999, the period between December 21, 1998 (assuming the ear-

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Based on the foregoing, we do not think that, prior to the holding of the Supreme Court in *Banks VI*, Banks can be said to have had notice that § 9545(b) would be considered jurisdictional in nature. Only at the time of that ruling can it be said with certainty that Banks would be absolutely barred from presenting his unexhausted claims to the state courts on the basis of jurisdiction which, from respondents' point of view, also would mean that Banks had forfeited, without notice, his exhausted claims. We conclude that this would not be an adequate state ground or, at least, would be a reason for equitable tolling of § 2244(d)'s limitations period. We emphasize that the tolling of the limitations period is equitable, not the statutory tolling for which § 2244(d)(2) provides.

Of course, this must be contrasted with our earlier holding concerning the unexhausted claims (*Banks VII*). In that instance, Banks had sixty days' notice that the limitations period of § 9545(b) would become effective and might well bar his second PCRA petition, regardless of whether the basis was found to be jurisdictional or simply expiration of the limitations period and no basis for tolling. The prior notice is what supports the state law ground, i.e. makes it adequate, and bars presentation of the unexhausted claims in this court.

In our holding, we reach the same conclusion as was reached in *Fidtler v. Gillis*, 1999 WL 450337 (E.D.Pa. June

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lier date applies), and March 22, 1999, still would not have exceeded the one year allowed before bringing the petition in this court.

29, 1999), though by a different analysis.[7] In that case, the court found that the petitioner's claims in a petition under § 2254 had not been exhausted but might be barred by § 9545 (b)(1).[8] Relying on cases decided prior to *Banks VI*, *see Fidtler* at *5-*6 (citing *Lambert*; *Commonwealth v. Alcorn*, 703 A.2d 1054, 1057 (Pa.Super. 1997), *allocatur denied*, 555 Pa. 711, 724 A.2d 348 (1998) (table); *Commonwealth v. Ferguson*, 722 A.2d 177, 179 (Pa.Super. 1998); *Commonwealth v. Austin*, 721 A.2d 375, 377 (Pa.Super. 1998), *allocatur denied*, 1999 WL 266268 (Pa. May 04, 1999) (table); *Banks V*), the court dismissed the case so that the operation of § 9545(b) could be determined by the state courts in the first instance. However, because the petitioner's exhausted claims might be barred (as through taking more than a year to exhaust), the court dismissed without prejudice. In this way, the filing date of an amended petition would relate back to the date of the filing of the original petition under Fed.R. Civ.P. 15(c)(2), and the one-year bar could be avoided. *Id.* at 211-12.[9]

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[7] The difference in the analysis stems from the fact that this court previously dismissed a § 2254 petition pursuant to an order of the Court of Appeals and now is considering the second petition, while the court in *Fidtler* was considering the petition at the time of dismissal. Also, unlike the court in *Fidtler*, we are presented with an instance in which a second PCRA petition clearly is barred because the state courts already have so held. The court in *Fidtler* does not mention the applicability of *Banks VI* (that § 9545(b) is jurisdictional) to the facts before it.

[8] Which the court denominated a "statute of limitations."

[9] The Third Circuit discussed a similar problem in *Morris v. Horn*, No. 98-9008 (3d Cir. Aug. 9, 1999), a slip opinion which was received in this court after the drafting of this opinion.

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In other words, the court found that it would be unfair to require exhaustion only to have the time necessary for exhaustion lead to a bar of the petitioner's claims. This is especially so when there is a possibility that one or more of the exceptions to the jurisdictional time bar may apply. The *Fidtler* court therefore used the vehicle of dismissal without prejudice to avoid the statutory bar and resulting unfairness. In this case, we have determined that the limitations period was equitably tolled during the time that Banks' second PCRA petition was pending. Thus, the unfairness of not permitting a petitioner to present exhausted claims based on a time limitation which expires during a required attempt to exhaust other claims is avoided.

In short, we find that the statute of limitations under § 2244(d) was tolled during the period between October 24, 1997, and March 2, 1999. However, we limit our holding to the facts of this case, since the Supreme Court of Pennsylvania now has provided notice that § 9545(b) is to be read as a jurisdictional limit and not subject to relaxed waiver. Thus, the filing of an untimely PCRA petition would not toll the limitations period under § 2244(d) in every case.

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Morris was granted an order similar to that in *Fidtler*. The Third Circuit indicated that, if the second PCRA petition was found to be untimely and the "relation back" strategy was found to be invalid, the entire time that the second PCRA petition was pending was not tolled under § 2244(d)(2). *Id.* at 7. The Third Circuit indicated, however, that it was not deciding the question of equitable tolling, *id.* at 14 n. 5, the basis for our ruling in this case.

IV. STANDARD

The amended version of § 2254, which sets forth a more stringent standard for issuance of the writ, although not applicable to Banks' earlier petition, is now applicable because the instant petition was filed after the effective date of AEDPA. We note initially that we reject Banks' contention that pre-AEDPA standards govern because he filed an earlier petition that was dismissed as a mixed petition. Banks cites *Christy v. Horn*, 115 F.3d 201, 208 (3d Cir. 1997), for the proposition that a petition which is filed after a prior petition was dismissed for failure to exhaust is not a second or successive petition. This very principle contradicts Banks' next argument, that his petition is a "continuation" of the proceedings related to his prior petition in this court. Actually, the point of *Christy* is that, once a petitioner has exhausted all of his state remedies and files a petition under § 2254, that petition is a "first" petition for purposes of the district court's authority to entertain the petition without prior approval of the court of appeals. *See* 28 U.S.C. § 2244(b)(3).

The same is true of *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998), on which Banks also relies. In that case, the Supreme Court equated a claim dismissed as unripe with a claim dismissed as unexhausted for purposes of whether a petition asserting the claim was a second or successive petition for purposes of § 2244. Thus, when the petitioner's claim that he was incompetent to be executed (dismissed initially by the district court as unripe) was presented later, the petition was to be considered a "first" petition and no authorization from a court of appeals was necessary.

Banks points to language in *Stewart* which says, "A court where such a petition was filed could adjudicate these

claims under the same standard as would govern any other first petition." 118 S.Ct. at 1622. Actually, any other first petition would be governed by the standards enacted in AEDPA.

Nothing in *Stewart*, *Christy*, or AEDPA indicates that pre-AEDPA law applies in cases in which the petitioner has had a prior petition dismissed for failure to exhaust. On March 22, 1999, when Banks filed the instant petition, which must be deemed his "first" petition under 28 U.S.C. § 2244(b)(3), AEDPA was in effect and AEDPA principles apply.

The relevant provisions now read:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.
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> (e)(1) In a proceeding initiated by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a

> factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(d), (e)(1). Also, the circumstances which would warrant an evidentiary hearing in the habeas court are strictly limited under 28 U.S.C. § 2254(e)(2).

Since AEDPA was passed, the state court decision is the starting point in habeas review. *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 885 (3d Cir. 1999). Section 2254(d) sets forth two conditions (subsections (d)(1) and (d)(2)), at least one of which must be met before habeas relief may be granted. *Id.* at 887. Examination of the first of these conditions entails a two-step analysis.

Before granting relief under § 2254(d)(1) for a state court adjudication of a claim "contrary to" established federal law as established by the Supreme Court, the habeas court first must "identify the applicable Supreme Court precedent and determine whether it resolves the petitioner's claim." *Id.* at 888. "[T]his analysis requires 'something more than a recognition that the Supreme Court has articulated a general standard that covers the claim.'" *Id.* (quoting *O'Brien v. Dubois*, 145 F.3d 16, 24 (1st Cir. 1998)). Rather, the petitioner must show that "'Supreme Court precedent requires an outcome contrary to that reached by the relevant state court.'" *Id.* (quoting *O'Brien* at 24-25). The Supreme Court precedent need not be factually identical to the petitioner's case, but must be a rule which, by virtue of factual similarity or distillation of general precepts into a channeled mode of analysis intended for application to variant factual situations, can fairly be said to require a particular result in the petitioner's case. *Id.* at 888-889.

If the state court decision was not "contrary to" applicable Supreme Court precedent, then the federal habeas court must determine whether the state court decision was based on an "unreasonable application of" established Supreme Court precedent. *Id.* at 889. An "unreasonable application" is not one with which the habeas court disagrees or one which leads to a different result than the habeas court would reach on its own. *Id.* Rather, the "question is whether the state court's application of Supreme Court precedent was objectively unreasonable." *Id.* at 889-890. Under this standard, habeas relief is not warranted "unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." *Id.* at 890. While it is Supreme Court precedent that supplies the applicable rule, thereby precluding consideration of the opinions of lower federal courts on questions not addressed by the Supreme Court, a habeas court may consider lower federal court decisions in determining the reasonableness of the state court's application of Supreme Court precedent, that is, as helpful amplifications of Supreme Court precedent. *Id.*

Prior to the passage of AEDPA, there was a presumption in habeas corpus proceedings that factual determinations by a state court were correct. *Jackson v. Byrd*, 105 F.3d 145, 147 (3d Cir.), *reh'g denied, cert. denied*, 520 U.S. 1268, 117 S.Ct. 2442, 138 L.Ed.2d 201 (1997).[10] Since AEDPA was

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[10] The Third Circuit has yet to address the standard for federal habeas review of factual findings by the state courts. Each of its recent opinions under § 2254 involved petitions filed before the effective date of AEDPA, so that pre-amendment standards applied. *See Byrd* at 147; *Buehl v. Vaughn*, 166 F.3d 163,

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enacted, the presumption of correctness still applies but the quantum of proof necessary to rebut the presumption has been increased (to the "clear and convincing" standard), making it more difficult for the petitioner to do so. *Warren v. Smith*, 161 F.3d 358, 360-361 (6th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 2403, 144 L.Ed.2d 802 (1999); *Bressette v. N.Y. State Div. of Parole*, 2 F.Supp.2d 383, 386-387 (W.D.N.Y. 1998). Thus, federal courts on habeas review are required to give greater deference to factual determinations by state courts. *Bressette* at 387 (quoting, *inter alia*, *Ford v. Ahitow*, 104 F.3d 926, 936 (7th Cir. 1997); *Houchin v. Zavaras*, 107 F.3d 1465, 1470 (10th Cir. 1997)). The presumption applies to findings of fact by both the trial and appellate courts of the state. *Id.* at 386.

V. MENTAL COMPETENCY

Although not numbered first among the issues presented by Banks, we address first the question of Banks' mental competency at the time of trial because several of the claims flow from the competency issue.

Even before enactment of AEDPA, the Supreme Court of the United States held that a state court's finding of competency was a factual matter which is binding on a federal court unless the record does not support the finding. *Demosthenes v. Baal*, 495 U.S. 731, 735, 110 S.Ct. 2223, 109 L.Ed.2d 762 (1990) (per curiam). However, the duty to determine a defendant's mental competency continues

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168-169 (3d Cir.), *cert. dismissed*, ___ U.S. ___, 119 S.Ct. 2418, 144 L.Ed.2d 815 (1999); *Meyers v. Gillis*, 142 F.3d 664, 667 (3d Cir. 1998). Hereafter, then, we look to the language of the statute and opinions of other courts interpreting that language.

throughout trial, and a trial court must stop the trial and conduct a hearing when there are circumstances suggesting a change in the defendant's psyche rendering the defendant incompetent to stand trial. *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). Still, there is no constitutional requirement of a second or successive hearing absent evidence of a substantial change in the mental condition. *Senna v. Patrissi*, 5 F.3d 18, 20 (2d Cir. 1993).

A criminal defendant is competent to stand trial if he or she has the ability to consult with counsel to a reasonable degree of rational certainty and has a rational and factual understanding of the proceedings. *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (per curiam); *McFadden v. United States*, 814 F.2d 144, 146 (3d Cir. 1987).[11]

The trial court conducted a pre-trial hearing to determine whether Banks was competent to stand trial. The court's finding of competence was supported by the testimony of a psychiatrist called by the Commonwealth and therefore is supported by the record. Banks argues, however, that his mental condition deteriorated during trial until he became incompetent; that is, he decompensated during trial. We discussed this issue at length in *Banks IV*, and we believe that discussion continues to be applicable:

> As noted, the trial court made a pre-trial determination that Banks was mentally competent to stand trial. The court continued to observe Banks for signs that his condition with respect to competency had

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[11] This test is codified at 18 U.S.C. § 4243(a). The analogous provision under Pennsylvania law is codified at 50 Pa.Stat. Ann. § 7402(a).

changed. *See, e.g.*, N.T. trial vol. 2 at 454-455 (June 8, 1983) (noting that questioning by and demeanor of Banks established competency); vol. 5 at 1,645 (June 16, 1983) (noting that trial court had seen nothing to warrant change of mind with respect to competency determination); *Banks I* at 13 (reciting factual finding of trial court as to Banks' demeanor and participation as related to competency, also set forth in present record in Respondents' Appendix A (record document no. 33, Opinion dated October 17, 1985, at 15 n. 2)). Banks asked meaningful, at times very insightful, questions of witnesses. *See, e.g.*, N.T. trial vol. 2 at 888-889 (June 9, 1983) (eliciting testimony of firearms/ballistics expert that it was unlikely that ammunition from weapon used would be found in body because of its velocity, despite fact that fragments were found in the body). It also should be noted, as pointed out by Banks, that defense counsel repeatedly reminded the trial court of its duty to consider Banks' competency through a number of motions to suspend proceedings for another competency hearing.

Based on the foregoing, it is clear that the trial court remained mindful of its responsibility with respect to the determination of competency, and determined that Banks was mentally competent to stand trial.

The only evidence of a change in the mental condition of Banks during the course of the trial to which he points is the testimony of Park E. Dietz, M.D., a psychiatrist called by the Commonwealth on the issue of Banks' sanity at the time of the offenses. N.T. trial vol. 5 at 1,800-1,888; 1,890-1,932 (June 17,

1983). Specifically, Dr. Dietz testified on direct examination, in part, as follows:

> . . . I had the opportunity to observe Mr. Banks testify yesterday, and his testimony shows that he has paranoia, to me.
>
> I recognized, in his testimony, every one of the symptoms of his disease that has been discussed in the testimony I've heard. Yesterday Mr. Banks showed delusions and psychotic thought, which is really the symptom of this illness. And so, yesterday, I was able to observe that.
>
> He's been said to be on a deteriorating course, getting worse with this illness. Dr. Spodak testified, in a hearing that I attended last February 28, that Mr. Banks was deteriorating rapidly. And there's been testimony since then that Mr. Banks is deteriorating. Given that and given the fact that he's been psychotic since he was in prison, I think yesterday I had a chance to see him at his worst and to see all the symptoms that Mr. Banks shows when he is at his sickest.

Id. at 1,828. Dr. Dietz added later in his testimony on direct examination:

> Now, Mr. Banks was described by Dr. Turchetti as being more floridly psychotic in February than he had been back in October, at the original interviews, and I think that significant, because I've indicated to you that Mr.

> Banks seems to be worse now than he was in the past; that his behavior on the witness stand is, by all accounts, more seriously disordered than his behavior before the shootings and, in my opinion, at the time of the shootings, so the disorder, according to Dr. Turchetti, was worse in February than in October.

Id. at 1,835.

This testimony is consistent with all of the psychiatric testimony on the issue of whether Banks suffered from a mental disease or defect. That is, all of the psychiatrists agreed that Banks suffered from paranoia or paranoid psychosis, which is distinguishable from paranoid personality and paranoid schizophrenia. In the current version of the standard text on mental disorders, the disease described by the psychiatrists appears to be a "delusional disorder," subclassified as a "persecutory type." *Diagnostic and Statistical Manual of Mental Disorders* 296-298 (4th ed. 1994). Dr. Weatherly cited an earlier version in his testimony. N.T. competency hearing at 10 (May 6, 1983) (citing *Diagnostic and Statistical Manual Three*, or third edition, and diagnosing as "numerically number 297.10").

The differences in the testimony appear in the opinions of the psychiatrists with respect to the impact of the disease on Banks' cognitive abilities. During trial, the psychiatrists called by the defense opined that, as a result of the paranoia, Banks was unable to understand the nature and consequences of his actions or to distinguish right from wrong at the time of the offenses, while the Commonwealth's psychiatrists

reached the opposite conclusion (despite accepting the existence of the disease). In other words, the testimony was in conflict as to the effect of the disease on Banks' cognitive functions. *See esp.* N.T. trial vol. 5 at 1,828 (June 17, 1983) (testimony of Dr. Dietz that "... as for the effect on thinking, on judgment, on other areas of mental life, paranoia doesn't have an effect on those areas of mental life"). Moreover, Dr. Sadoff testified during the pre-trial competency hearing that Banks' paranoia did not render him incompetent to stand trial. N.T. competency hearing at 198 (March 15, 1983). There are, then, two problems with Banks' argument that the testimony of Dr. Dietz required the trial court to suspend the trial and conduct a full-blown competency hearing. First, Dr. Dietz was not testifying that Banks actually was deteriorating or decompensating; he was assuming as much based on previous testimony. Second, there is not necessarily a link between the disorder and mental competency to stand trial; in fact, the trial court had rejected such a link, supported by Dr. Sadoff's testimony, when it found Banks competent after the original hearing. Considering this evidence and accepting as true Banks' contention that his paranoia grew worse as trial approached and during trial, it does not follow that Banks was not competent.

We conclude that: (1) the trial court fulfilled its ongoing, constitutional obligation to ensure that Banks was competent to stand trial; (2) the trial court's determination that Banks was competent is supported by the record; and (3) the equivocal nature of the evidence on which Banks relies, weighed against the evidence of the ongoing observation of Banks by the trial court, makes the testimony of Dr.

> Dietz insufficient to rebut the presumption that the determination of competency was correct. In the language of *Drope*, there are no "circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." Based on this conclusion, we find that grounds (2) and (4) of Banks' petition do not warrant habeas relief.

Banks IV at 1171-1173. We reach the same conclusions at this time. In the terms now applicable under § 2254(d), the decision of the state courts in finding that Banks was competent did not result in a decision (1) contrary to or involving an unreasonable application of clearly established federal law or (2) based on an unreasonable factual determination in light of the evidence produced in the state court proceedings. The finding of competence leads to the denial of habeas relief for the claims numbered (2), (4), and (5).

VI. WAIVER OF RIGHT TO COUNSEL

The first claim asserted by Banks (numerically) is that he did not effect a knowing and voluntary waiver of the right to counsel under the Sixth Amendment. Actually, Banks never waived the right to counsel and continued to be represented throughout the course of the trial. However, he did participate to some extent in the conduct of his defense. Banks' participation included personally cross-examining the ballistics expert called by the Commonwealth, testifying in his own defense, and directing counsel as to questions on cross-examination of the coroner and deputy coroners during presentation of the Commonwealth's rebuttal evidence. During his own testimony, Banks introduced photographs into evidence which had been excluded by the trial court during the Commonwealth's case in chief.

Banks contends that, in allowing him to participate to such an extent in his defense, the trial court in effect allowed him to proceed *pro se* without conducting a colloquy as to whether the waiver of the right to counsel was knowing and voluntary. *See generally Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). Actually, Banks' participation in his defense constituted hybrid representation, which is a matter within the discretion of the trial court. *United States v. Einfeldt*, 138 F.3d 373, 378 (8th Cir.), *cert. denied*, 525 U.S. 851, 119 S.Ct. 126, 142 L.Ed.2d 102 (1998); *United States v. Treff*, 924 F.2d 975, 979 n. 6 (10th Cir.), *cert. denied*, 500 U.S. 958, 111 S.Ct. 2272, 114 L.Ed.2d 723 (1991).[12]

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[12] We do not attempt here to establish a bright line between proceeding *pro se* and hybrid representation. At least one commentator has discussed such a bright line, concluding that a *pro se* defendant conducts the entirety of the defense. If there is standby or advisory counsel (the terms apparently meant to be interchangeable), counsel is present in the courtroom but silent as to the presentation of the defense. Standby or advisory counsel's role is limited to providing technical advice, protecting the record for appeal, and being available to take over the case if the defendant waives the right to proceed *pro se*. Whenever counsel takes any active role in the defense, it is termed a hybrid defense. Note, *The Accused as Co-Counsel: The Case for the Hybrid Defense*, 12 Valparaiso L.Rev. 331, 331-332 (1978).

On the other hand, the Third Circuit in *Bontempo v. Fenton*, discussed in the text *infra*, held that a defendant was not required to waive the right to counsel because his own part in presenting the defense was merely supplemental to his counsel's representation. This holding can be taken to mean that the

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In *United States v. Leggett*, 81 F.3d 220, 223-226 (D.C.Cir. 1996), the defendant supplemented his counsel's questions with questions of his own, cross-examined three government witnesses, asked questions of two witnesses called by the defense, and made a closing argument after his own counsel's argument. Because Leggett did not forgo the right to counsel, instead supplementing representation by counsel, the District of Columbia Circuit held that he had not elected to proceed *pro se* and no colloquy was required. "Leggett wanted both the benefit of counsel and the ability to take the reins himself from time to time . . . and by dint of the court's indulgence, he had his cake and ate it too." *Id.* at 226 (citation omitted).

Banks argues, however, that a waiver of the right to counsel is required even in the instance of hybrid representation. In support of this proposition, he cites three cases from the Ninth Circuit, *United States v. Turnbull*, 888 F.2d 636, 638 (9th Cir. 1989), *cert. denied*, 498 U.S. 825, 111 S.Ct. 78, 112 L.Ed.2d 51 (1990), *United States v. Kimmel*, 672 F.2d 720 (9th Cir. 1982), and *Evans v. Raines*, 534 F.Supp. 791, 797 n. 9 (D.Ariz. 1982); a Tenth Circuit case which does not stand for the proposition for which it is cited, *United States v. Padilla*, 819 F.2d 952, 959-960 (10th Cir. 1987); a Pennsylvania Superior Court case, *Commonwealth v. Palmer*, 315

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representation becomes effectively *pro se* at some point before the defendant takes over sole control of the defense; that is, at the point at which the defendant's role is no longer merely supplemental to counsel's role.

In this case, Banks supplemented rather than supplanted his counsel, and so the dilemma need not be resolved.

Pa.Super. 601, 462 A.2d 755, 758 (1983); and the dissent in a Third Circuit opinion, *Bontempo v. Fenton*, 692 F.2d 954, 963 (3d Cir. 1982) (Sloviter, J., dissenting), *reh'g, reh'g in banc denied, cert. denied*, 460 U.S. 1055, 103 S.Ct. 1506, 75 L.Ed.2d 935 (1983).

We begin with the Tenth Circuit opinion, *Padilla*. In that case, the defendant elected to proceed *pro se*. The Tenth Circuit stated that the appointment of standby counsel is preferred in such circumstances but the court still must ensure that the waiver of the right to counsel is knowing and intelligent. 819 F.2d at 959-960. Banks recites the holding in this respect as "valid waiver of counsel required when there is anything less than full representation by counsel." Brief in Support of Petition for Writ of Habeas Corpus at 8. Actually, the opinion states, "Anything less than full representation by counsel raises the question of valid waiver of the right to counsel." *Padilla* at 960 (citations omitted).

Thus, while it is true that *Padilla* stands for the proposition that the court must examine whether the arrangement is one of hybrid representation or *pro se* status with standby counsel (the latter requiring a waiver of the right to counsel), and suggests that anything less than full representation gives rise to this duty to examine, it does not equate hybrid representation with *pro se* status. In fact, the Tenth Circuit in *Treff* (at 979 n. 6) noted that a request to proceed with hybrid representation is not deemed a request to proceed *pro se*, thereby specifically distinguishing the two situations. Also, in *Treff*, the defendant argued that his right to represent himself was violated when his request to participate in his defense was denied. The Tenth Circuit held that he did not make an unequivocal request to proceed *pro se*, and so the argument failed. It should be noted however, that the

defendant was permitted to begin an opening statement.[13] That action was not found to be the equivalent of proceeding *pro se*.

We conclude that the Tenth Circuit does *not* require a waiver of the right to counsel under *Faretta* before the trial court may exercise its discretion to permit hybrid representation.

Banks' citation to *Palmer* also misses the mark. In that case, the defendant elected to proceed *pro se* with the exception of selecting a jury, making closing remarks, and filing post-trial motions. Those actions would be left to standby counsel, who also would confer with the defendant during trial. *Palmer* at 758. The defendant would personally make an opening statement and examine witnesses. *Id.* at 758-759. The Superior Court held that this arrangement really did not constitute *pro se* representation but a partial waiver of the right to counsel. *Id.* at 759. Thus, a colloquy on the partial waiver was necessary, but only as to those aspects of the trial for which the defendant would be representing himself. *Id.*

Several points must be emphasized about *Palmer*. First, the Superior Court referred to Pa.R.Crim.P. 318(c), not the Constitution, as the basis for its ruling. Second, the trial court did instruct the defendant on those aspects of the trial for which he represented himself, which is the same as occurred in this case: the trial court warned Banks about the wisdom of those actions taken *pro se*. Finally, the Superior Court concluded in *Palmer* that the defendant was

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[13] Treff's opening statement was cut short when he accused the trial judge of bias. *Treff* at 979.

proceeding effectively *pro se*. We have not so concluded, and therefore the principle announced in *Palmer* is inapplicable.[14]

More on point is *State v. Layton*, 189 W.Va. 470, 477-479, 432 S.E.2d 740, 747-749 (1993) (citing, *inter alia*, *Bontempo*, discussed below, and *Palmer*), in which the rationale for distinguishing between *pro se* representation and hybrid representation is discussed thoroughly. Succinctly stated, when counsel participates in the defense of the case by assisting the defendant and actually presenting the defense, there is not the danger faced by a defendant who opts to represent himself or herself, or with merely a technical advisor. *Id.* at 478, 432 S.E.2d 740, 432 S.E.2d at 748 (quoting *State v. Barker*, 35 Wash.App. 388, 395, 667 P.2d 108, 113 (1983)).

We do not believe that it is necessary to determine the exact contours of what will constitute hybrid representation versus standby counsel or advisory counsel. Whatever the precise extent to which counsel must participate in the defense before counsel will be part of hybrid representation, as opposed to standby or advisory counsel, we think that there plainly was hybrid representation of Banks.

[14] In *Commonwealth v. Lloyd*, 370 Pa.Super. 65, 535 A.2d 1152, *allocatur denied*, 518 Pa. 637, 542 A.2d 1367 (1988) (table), the Superior Court relied on *Palmer* in holding that the standard of completeness of the colloquy under Rule 318(c) is lower when standby counsel is appointed. The Supreme Court of Pennsylvania abrogated *Lloyd* in *Commonwealth v. Brazil*, 549 Pa. 321, 326, 701 A.2d 216, 219 (1997), when it held that a full and complete colloquy is necessary whenever a defendant seeks to waive the right to counsel. This holding undermines, and probably abrogates, the holding of *Palmer* to the effect that a partial waiver only requires a partial colloquy.

We turn next to the only Third Circuit opinion cited by Banks, *Bontempo*, an appeal from the granting of a writ of habeas corpus. In that case, the state trial court was giving the final charge to the jury when the defendant interrupted by shouting, "I would like to say something." The outburst continued before the jury was removed from the courtroom. The judge indicated that the defendant would be permitted to address the jury (in effect a closing argument) and even to reopen the defense for further testimony, and allowed the defendant to consult with counsel. After consulting with his attorney and a short colloquy with the court, the defendant addressed the jury. 692 F.2d at 956. One of the defendant's arguments was that the additional summation deprived him of the assistance of counsel in violation of the Sixth Amendment. *Id.* at 959-961.

In a 2-to-1 decision, the Third Circuit found no violation of the Sixth Amendment for several reasons, such as the fact that his statement permitted him to place before the jury a number of matters which would not have been admissible had he testified under oath. The tactic also permitted the defendant to avoid cross examination on his prior criminal record. *Id.* at 960. Most important for present purposes is the following portion of a footnote in the majority opinion:

> As the dissent aptly notes, the unorthodox procedure used at the trial causes some difficulty in categorizing the alleged violations in this case. Although the dissent finds a partial deprivation of counsel in Bontempo's summation, *his remarks were really supplemental to, and not in lieu of*, retained counsel's closing to the jury. In the circumstances here; it is not clear that Bontempo's actions amounted to a "partial waiver of his right to counsel." . . .

Id. at 961 n. 6 (emphasis added).

In dissent, Judge Sloviter viewed the defendant's statement to the jury as a partial waiver of the right to counsel requiring the same inquiry as a complete waiver. *Id.* at 964. Rather obviously, a dissenting opinion would not be a valid basis on which this court may rely; we are bound by the majority opinion. Since the Third Circuit has held that a represented defendant may "supplement" his defense, the situation in this case, Banks' argument fails.

With respect to the opinions of the Ninth Circuit cited by Banks, we disagree with the reasoning and adopt instead the rationale stated in *Layton*. This would be so even if we were not bound by *Bontempo*.

Also, after this review of the law of hybrid representation, we note that Banks points to no opinion of the Supreme Court of the United States which would clearly establish that a criminal defendant is entitled to an inquiry by the trial court before it exercises its discretion to permit hybrid representation. Rather, *Faretta* and *McKaskle* were addressed to the right to proceed *pro se* and to the more traditional situation of a defendant appearing *pro se* with the court appointing standby counsel for the purpose of answering procedural questions. The absence of Supreme Court authority existed at the time of Banks' trial and continues today, so that retroactivity analysis is not implicated. Banks is not entitled to habeas relief in absence of such authority, and the claim numbered (1) must be denied on this basis.

VII. WAIVER OF RIGHT AGAINST SELF-INCRIMINATION

In his claim numbered (3), Banks alleges that he did not effect a knowing, intelligent and voluntary waiver of his right against self-incrimination under the Fifth Amendment. The primary basis for this claim is that Banks was not competent to waive his rights. The issue of competency has been addressed and resolved against Banks, and so this argument fails.[15] Banks is not entitled to habeas relief on the claim numbered (3).

VIII. JURY INSTRUCTIONS, VERDICT SLIP, JURY POLL

Banks' sixth claim is that the trial court's instructions to the jury, the verdict slip, and the jury poll in the sentencing phase all required the jury to find unanimously both aggravating and mitigating circumstances, in violation of the defendant's Eighth Amendment rights. Such a requirement would violate the rule of *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). *See also McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). As we noted in *Banks IV*, there is no substantial difference between the charge and verdict form used by the trial court in this case and the charge and verdict form reviewed by the Third Circuit in *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 306-309 (3d Cir.), *reh'g denied, cert. denied*, 502 U.S. 902, 112 S.Ct. 280, 116 L.Ed.2d 232 (1991).

> [The jury charge and verdict form] state repeatedly that the jury must find unanimously at least one

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[15] Regardless, it should be noted that the trial court in fact did warn Banks concerning his decision to testify.

> aggravating circumstance beyond a reasonable doubt and that any aggravating circumstances so found must out weigh any mitigating circumstances (to be found by a preponderance of the evidence). They also state that the final verdict must be unanimous. Nowhere is there a statement that any mitigating circumstances must be found unanimously by the jury before they could be weighed against any aggravating circumstances.

Banks IV at 1174. *See also DeShields v. Snyder*, 829 F.Supp. 676, 688 (D.Del. 1993) (reaching same conclusion reviewing similar jury instruction). In fact, other federal courts have been consistent in holding that there is no constitutional violation in jury instructions which state that the jury must be unanimous in finding aggravating circumstances and do not state that the jury must be unanimous as to any mitigating circumstances, but also do not specify that the jury need not be unanimous as to any mitigating circumstances. *See Noland v. French*, 134 F.3d 208, 213 (4th Cir.) (citing *Smith v. Dixon*, 14 F.3d 956, 981 n. 15 (4th Cir.) (en banc), *cert. denied*, 513 U.S. 841, 115 S.Ct. 129, 130 L.Ed.2d 72 (1994); *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir.1993), *cert. denied*, 510 U.S. 1171, 114 S.Ct. 1208, 127 L.Ed.2d 556 (1994); *Maynard v. Dixon*, 943 F.2d 407, 418-420 (4th Cir. 1991), *cert. denied*, 502 U.S. 1110, 112 S.Ct. 1211, 117 L.Ed.2d 450 (1992)), *cert. denied*, 119 S.Ct. 125, 142 L.Ed.2d 101 (1998); *Duvall v. Reynolds*, 139 F.3d 768, 791-792 (10th Cir.), *cert. denied*, 525 U.S. 933, 119 S.Ct. 345, 142 L.Ed.2d 284 (1998); *Griffin v. Delo*, 33 F.3d 895, 905-906 (8th Cir. 1994), *reh'g, reh'g en banc denied, cert. denied*, 514 U.S. 1119, 115 S.Ct. 1981, 131 L.Ed.2d 869 (1995); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1120-1121

(6th Cir. 1990) (en banc; dissenting opinion),[16] *cert. denied*, 499 U.S. 970, 111 S.Ct. 1608, 113 L.Ed.2d 669 (1991).

In contrast, the Third Circuit has reviewed a jury charge similar to that used by the trial court in this case, and to many of those discussed in the cases cited above, and concluded that "it was reasonably likely that the jury could have believed that it was required to find the existence of mitigating circumstances unanimously before those circumstances could be considered in its deliberations." *Frey v. Fulcomer*, 132 F.3d 916, 924 (3d Cir. 1997), *cert. denied*, 524 U.S. 911, 118 S.Ct. 2076, 141 L.Ed.2d 151 (1998).[17] Banks relies on *Frey* due to the similarity of language in the jury charges.

There are several problems with reliance on *Frey*. First, it does not appear from the language of § 2254 that the principles enunciated in *Frey* are applicable to the case before us. *Frey* involved a habeas petition filed prior to AEDPA, so that the amended version of § 2254 did not apply. That section now permits the granting of relief only if the state courts' resolution of the federal issue "resulted in a decision that was contrary to, or *involved* an unreasonable application of," Supreme Court precedent. Sec. 2254(d)(1) (emphasis added). The use of the past tense indicates that it

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[16] Although part of the dissenting opinion, nine judges including the author joined the portion cited (designated Part IV of the dissent). Since thirteen judges were sitting en banc, Part IV commanded a majority.

[17] This issue is likely to recur, since the Supreme Court of Pennsylvania adamantly rejected the Third Circuit's opinion in *Frey*. *Commonwealth v. Cross*, 555 Pa. 603, ___, 726 A.2d 333, 336-338 (1999).

is the time of the state court decision that is relevant, not the time of habeas review. *See also* § 2254(e)(2)(A)(i) (condition for evidentiary hearing is that new rule of constitutional law has been made retroactive to cases on collateral review by Supreme Court, thereby precluding retroactivity analysis by habeas court). *Mills* was not decided until 1988, some five years after Banks' conviction and sentence, and has not been made retroactive by the Supreme Court. Because we find that the language of AEDPA establishes that the point in time at which the Supreme Court precedent must be "clearly established" is at the time that the state court makes its ruling on the federal constitutional issue, we do not address the parties' arguments concerning the retroactivity of *Mills*.

Moreover, as reflected in the decisions cited above, Supreme Court precedent (in the form of *Mills* and *McKoy*) did not require an outcome contrary to that reached by the state courts. That the Third Circuit reached a contrary result does not mean that the decision of the state courts was unreasonable.

Banks is not entitled to habeas relief on his claim numbered (6).

IX. PROPORTIONALITY REVIEW

Finally, Banks contends that the Pennsylvania statute governing proportionality review which was in effect at the time of his initial appeal to the Supreme Court of Pennsylvania violated his right to procedural due process.[18] This claim lacks merit for a number of reasons.

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[18] The provision requiring proportionality review by the Supreme Court of Pennsylvania, 42 Pa.Cons.Stat.Ann. § 9711(h),

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First, proportionality is not constitutionally mandated. *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). In *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), the petitioner challenged some of the wording of an aggravating factor under the Arizona death penalty statute which had been limited by the state supreme court's construction. The Supreme Court of the United States found that, with the added interpretation, the challenged language provided sufficient guidance to the sentencer. *Id.* at 655, 110 S.Ct. 3047.

The Supreme Court added:

> Walton nevertheless contends that the heinous, cruel, or depraved factor has been applied in an arbitrary manner and, as applied, does not distinguish his case from cases in which the death sentence has not been imposed. In effect Walton challenges the proportionality review of the Arizona Supreme Court as erroneous and asks us to overturn it. This we decline to do, for we have just concluded that the challenged factor has been construed by the Arizona courts in a manner that furnishes sufficient guidance to the sentencer. This being so, proportionality review is not constitutionally required, and we "lawfully may presume that [Walton's] death sentence was not 'wantonly and freakishly' imposed -- and thus that the sentence is not disproportionate within any recognized meaning of the Eighth Amendment." *McCleskey v. Kemp*, 481

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has been repealed. Act 28, Pub.L. 293, No. 28, § 1 (June 25, 1997), immediately effective. *See also Commonwealth v. Chester*, 1999 WL 419717, at *14 n. 16 (Pa. June 24, 1999).

> U.S. 279, 306, 308, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Pulley v. Harris*, 465 U.S. 37, 43, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Further more, the Arizona Supreme Court plainly undertook its proportionality review in good faith and found that Walton's sentence was proportional to the sentences imposed in cases similar to his. The Constitution does not require us to look behind that conclusion.

Id. at 656-657, 110 S.Ct. 3047.

In other words, proportionality review is not an adversarial proceeding independent of the sentencing and appeal process. The standard in such an instance is that the sentencer, whether a jury or judge, must have sufficient guidance (statutory or case law) so that the death penalty is not wantonly or freakishly imposed. This being the case, the defendant does not have a right to have a federal court examine the state courts' decision on proportionality review.

Banks argues that he has a "liberty interest" which is not protected because the process of proportionality review is not adversarial, i.e. he did not have the opportunity to challenge or provide input into the decision of the Supreme Court of Pennsylvania. The Supreme Court rejected this argument in *Banks II*. It pointed out that its review is conducted pursuant to its decision in *Commonwealth v. Frey*, 504 Pa. 428, 475 A.2d 700, *cert. denied*, 469 U.S. 963, 105 S.Ct. 360, 83 L.Ed.2d 296 (1984).[19] *Banks II* at 474. The fact that the opinion gives a reasonable construction to the language is consistent with *Walton* and rebuts any contention that the statute itself gives insufficient guidance.

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[19] This is the same case as reviewed by the Third Circuit in *Frey v. Fulcomer*. *See* p. 36-37 and n. 17, above.

The Supreme Court also pointed out that the information on which it relied in conducting proportionality review is available at no cost to the public from the Administrative Office of Pennsylvania Courts. Thus, a capital defendant may obtain the information and, if necessary, investigate its accuracy. *Id.* A challenge to the accuracy of such information can be made to the Supreme Court on direct appeal or in a PCRA petition. Banks, for instance, raised his due process argument in his first PCRA petition, as reflected in the opinion. However, as noted by the Supreme Court, he pointed to no actual deficiency or inaccuracy in that information, nor that he was precluded from obtaining or investigating it. As we stated previously:

> In other words, Banks chose to argue the theory that if a deficiency or inaccuracy existed, he had no way to correct it, yet pointed to absolutely no deficiencies or inaccuracies. A theoretical deprivation is not a basis for habeas relief. Moreover, the opinion indicates that such a challenge may be made in the context of a petition for post-conviction relief.

Banks IV at 1175.[20]

We also reiterate what we stated previously regarding Banks' argument concerning the vagueness of the phrase "similar cases" for purposes of proportionality review: the phrase is ordinary English, not a term of art. No further

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[20] Since avenues of relief are available in the context of the ordinary criminal proceedings, we conclude that there is no procedural due process deprivation. We therefore do not address the concerns raised as *obiter dicta* by the Third Circuit in a footnote in *Frey*. *See id.* at n. 7.

clarification of the term is necessary to satisfy the Due Process Clause.

Banks is not entitled to habeas relief on his claim numbered (10).

X. CONCLUSION

We find no basis for the granting of relief under either of the conditions set forth in 28 U.S.C. § 2254(d), and Banks' petition for a writ of habeas corpus will be denied.

We are required to determine whether Banks has made a substantial showing of the denial of a constitutional right and, if so, to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed.R.App.P. 22(b)(1); *United States v. Eyer*, 113 F.3d 470 (3d Cir. 1997). If the Third Circuit determines that we have erred in applying AEDPA to Banks' claim relating to the jury instructions, verdict slip, and jury poll, then we would be constrained by the Third Circuit's opinion in *Frey* to conclude that Banks is entitled to a writ of habeas corpus. We have concluded that the verb tenses used in AEDPA indicate that the state court's holding must contravene Supreme Court precedent existing at the time of the holding. We cannot say conclusively that what seems to be plain language in a statute will govern the Third Circuit's conclusion as to the applicable time period. *See, e.g., Gibbs v. Roman*, 116 F.3d 83, 86 (3d Cir. 1997) (prisoner requesting leave to proceed without prepayment of fees under 28 U.S.C. § 1915 must allege that he or she was under imminent danger of serious physical injury at time of incident of which prisoner complains, and not at time of filing of complaint, despite statutory language that action may not be brought without prepayment of fees unless prisoner "*is* " under

imminent danger of serious physical injury[21]). *But see Banos v. O'Guin*, 144 F.3d 883 (5th Cir. 1998) (per curiam; proper focus is on time suit filed in district court, time of notice of appeal, or time of motion to proceed *in forma pauperis*); *Ashley v. Dilworth*, 147 F.3d 715 (8th Cir. 1998) (focus is on time of "filing"). We therefore will issue a certificate of appealability based on this issue.

An order consistent with this memorandum will issue.

ORDER

For the reasons stated in the accompanying memorandum, **IT IS ORDERED THAT**:

1. The petition for a writ of habeas corpus (record document no. 1) filed by petitioner George E. Banks is denied.

2. Banks' motion (record document no. 23) to amend the petition for a writ of habeas corpus is denied.

3. We certify pursuant to 28 U.S.C. § 2253(c); Fed. R.App.P. 22(b), that Banks has made a substantial showing of the denial of a constitutional right, specifically on the issue of whether the Third Circuit's opinion in *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997), *cert. denied*, 524 U.S. 911, 118 S.Ct. 2076, 141 L.Ed.2d 151 (1998), controls our consideration of Banks' petition and therefore requires issuance of the writ of habeas corpus.

---

[21] In other words, "is" means "was" or, to quote a statement which has been the subject of considerable public debate in recent months, "It depends on what your definition of 'is' is."

4. The stay of execution issued by this court shall remain in effect pending further order of court.

COURT'S APPENDIX I

September 24 & 25, 1982: Shootings and stand-off with police

February 28, 1983: Preliminary competency hearing

March 14, 1983: Competency hearing

May 6, 1983: Competency hearing

June 21, 1983: Banks found guilty by jury

June 22, 1983: Jury returns sentencing phase verdict of death

October 17, 1985: Post-trial motions denied

November 22, 1985: Formal sentence imposed by Court of Common Pleas

February 13, 1987: Pennsylvania Supreme Court affirms judgment of conviction and sentence (*Banks I*)

May 28, 1987: Pennsylvania Supreme Court denies reargument

October 5, 1987: U.S. Supreme Court denies *certiorari*

September 8, 1993: PCRA petition denied

March 27, 1995: Denial of PCRA petition affirmed by Pennsylvania Supreme Court (*Banks II*)

October 2, 1995: U.S. Supreme Court denies *certiorari*

February 15, 1996: Death warrant signed

February 22, 1996: District Court stays execution

March 22, 1996: Petition for writ of habeas corpus filed in District Court

May 28, 1996: Petition found not mixed, unexhausted claims dismissed by District Court (*Banks III*)

August 30, 1996: Petition denied (*Banks IV*)

January 14, 1997: Second PCRA petition filed in Court of Common Pleas

September 19, 1997: Denial of petition for writ of habeas corpus reversed by Third Circuit (*Banks V*)

March 2, 1999: Denial of second PCRA petition affirmed by Supreme Court of Pennsylvania (*Banks VI*)

March 9, 1999: Second execution warrant signed

March 22, 1999: Petition for writ of habeas corpus filed in District Court

March 26, 1999: Execution stayed by District Court

May 7, 1999: Four claims dismissed by District Court as procedurally barred (*Banks VII*)

EXCERPT FROM BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS' PETITION FOR REHEARING EN BANC FILED AT 99-9005 (U.S.C.A. 3D CIR.)

INTEREST OF *AMICUS CURIAE*

The Attorney General is the chief law officer and chief law enforcement officer of the Commonwealth of Pennsylvania. Pa. Const., Art. IV, § 4.1; Commonwealth Attorneys Act, 71 P.S. § 732-206(a). The Attorney General regularly represents respondents in habeas corpus proceedings brought by state prisoners challenging their convictions and sentences in the federal courts pursuant to 28 U.S.C. § 2254. The Attorney General has an abiding interest in seeing that attacks on successful convictions obtained in the courts of Pennsylvania, which have withstood review in the State courts, are properly litigated in the federal courts and that the federal courts exercising their jurisdiction in habeas corpus proceedings properly apply the federal habeas statute as interpreted by the United States Supreme Court. This interest extends to the proper application of cases like *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, which bar, with limited exceptions, application of new constitutional rules of criminal procedure by the federal courts in habeas corpus review to cases that were final on direct appeal in the State system before the new rules were announced.

The opinion of the panel in this case has serious implications for habeas litigation in the circuit in general, and in capital habeas litigation, in particular. The manner in which the panel addressed *Teague* (or failed to address it) will have ramifications in all habeas cases. The specific holding of the panel, invalidating a death sentence based on a perceived violation of *Mills v. Maryland*, 486 U.S. 367 (1988), will

directly impact at least thirty cases in which the Pennsylvania Supreme Court has rejected *Mills* challenges.[1] In most instances, as in this case, the State court addressed the merits of the claim and rejected it, oftentimes with an alternate holding.[2] In some of these cases the Supreme Court said that

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[1] To be sure, the Pennsylvania Supreme Court has found jury instructions or verdict slips which violated the teachings of *Mills* and granted relief. *See, e.g., Commonwealth v. Begley*, 780 A.2d 605 (Pa. 2001) (*Mills* error); *Commonwealth v. Young*, 572 A.2d 1217 (Pa. 1990) (*Mills* error); *Commonwealth v. Billa*, 555 A.2d 835 (Pa. 1989) (*Mills* error; *dicta*).

[2] *See, e.g., Commonwealth v. Kemp*, 753 A.2d 1278 (Pa. 2000) (no *Mills* error); *Commonwealth v. Murphy*, 657 A.2d 927 (Pa. 1995) (no *Mills* error); *Commonwealth v. Hackett*, 627 A.2d 719 (Pa. 1993) (no *Mills* error); *Commonwealth v. Thomas*, 744 A.2d 713 (Pa. 2000) (no *Mills* error; not ineffective for failing to predict change in law); *Commonwealth v. Holloway*, 599 Pa. 258, 739 A.2d 1039 (1999) (not ineffective for failing to predict change in law); *Commonwealth v. Rollins*, 738 A.2d 435 (Pa. 1999) (no *Mills* error); *Commonwealth v. Chester*, 733 a.2d 1242 (Pa. 1999) (no *Mills* error); *Commonwealth v. Breakiron*, 729 A.2d 1088 (Pa. 1999) (no *Mills* error; ineffectiveness not proven); *Commonwealth v. Holland*, 727 A.2d 563 (Pa. 1999) (no *Mills* error); *Commonwealth v. Porter*, 728 A.2d 890 (Pa. 1999) (no *Mills* error; not ineffective for failing to object); *Commonwealth v. Laird*, 726 A.2d 346 (Pa. 1999) (no *Mills* error; not ineffective for failing to object); *Commonwealth v. Blystone*, 725 A.2d 1197 (Pa. 1999) (no *Mills* error; not ineffective for failing to object); *Commonwealth v. Cross*, 726 A.2d 333 (Pa. 1999) (no *Mills* error; *Mills* not retroactive); *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998) (no *Mills* error; not ineffective for failing to object); *Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998) (no *Mills* error); *Commonwealth v. Whitney*, 708 A.2d 471 (Pa. 1998) (no *Mills* error; not ineffective for failing to predict change in law; *Mills* not

(Continued)

Mills was not applicable to cases that were final before the opinion in *Mills* was announced.[3] Some of these cases were final on direct appeal in the State courts before *Mills* was

(Continued)

retroactive); *Commonwealth v. Jermyn*, 709 A.2d 849 (Pa. 1998) (no *Mills* error; not ineffective for failing to raise issue; *Mills* not retroactive); *Commonwealth v. Henry*, 706 A.2d 313 (Pa. 1997) (no *Mills* error; not ineffective for failing to object); *Commonwealth v. Hardcastle*, 701 A.2d 541 (Pa. 1997) (no *Mills* error; not ineffective for failing to predict change in law; Mills not retroactive); *Commonwealth v. Travaglia*, 661 A.2d 352 (Pa. 1995) (no *Mills* error); *Commonwealth v. Smith*, 650 A.2d 863 (Pa. 1994) (no *Mills* error); *Commonwealth v. Wilson*, 649 A.2d 435 (Pa. 1994) (no *Mills* error); *Commonwealth v. Peterkin*, 649 A.2d 121 (Pa. 1994) (no *Mills* error; not ineffective for failing to object; *Mills* not retroactive); *Commonwealth v. Moore*, 633 A.2d 1119 (Pa. 1993) (no *Mills* error); *Commonwealth v. Young*, 637 A.2d 1313 (Pa. 1993) (no *Mills* error); *Commonwealth v. Marshall*, 633 A.2d 1100 (Pa. 1993) (no *Mills* error; not ineffective for failing to raise issue); *Commonwealth v. Stokes*, 615 A.2d 704 (Pa. 1992) (no *Mills* error); *Commonwealth v. Jones*, 610 A.2d 931 (Pa. 1992) (no *Mills* error); *Commonwealth v. Tilley*, 595 A.2d 575 (Pa. 1991) (no *Mills* error); *Commonwealth v. Jasper*, 587 A.2d 705 (Pa. 1991) ([no] *Mills* error); *Commonwealth v. Williams*, 570 A.2d 75 (Pa. 1990) (no *Mills* error); *Commonwealth v. O'Shea*, 567 A.2d 1023 (Pa. 1989) (no *Mills* error); *Commonwealth v. Frey*, 554 A.2d 27 (Pa. 1989) (no *Mills* error).

[3] *See, e.g., Commonwealth v. Cross, supra* (no *Mills* error; *Mills* not retroactive); *Commonwealth v. Whitney, supra* (no *Mills* error; not ineffective for failing to predict change in law; *Mills* not retroactive); *Commonwealth v. Jermyn, supra* (no *Mills* error; not ineffective for failing to raise issue; *Mills* not retroactive); *Commonwealth v. Hardcastle, supra* (no *Mills* error; not ineffective for failing to predict change in law; *Mills* not retroactive); *Commonwealth v. Peterkin, supra* (no *Mills* error; not ineffective for failing to object; *Mills* not retroactive).

announced.[4] Others were tried before *Mills* but decided on direct appeal after *Mills* was announced.[5] In many of those cases, the *Mills* issue had not been raised and preserved in the trial court and on direct appeal.[6] It was subsequently raised in a collateral proceeding attacking the judgment of sentence in the State courts under the Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. § § 9541 *et seq.*[7]

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[4] *See, e.g., Commonwealth v. Albrecht, supra; Commonwealth v. Whitney, supra; Commonwealth v. Jermyn, supra; Commonwealth v. Travaglia, supra; Commonwealth v. Smith, supra; Commonwealth v. Peterkin, supra; Commonwealth v. Frey, supra.*

[5] *Commonwealth v. Thomas, supra; Commonwealth v. Holloway, supra; Commonwealth v. Rollins, supra; Commonwealth v. Chester, supra; Commonwealth v. Breakiron, supra; Commonwealth v. Porter, supra; Commonwealth v. Laird, supra; Commonwealth v. Blystone, supra; Commonwealth v. Abu-Jamal, supra; Commonwealth v. Henry, supra; Commonwealth v. Hardcastle, supra; Commonwealth v. Wilson, supra; Commonwealth v. Moore, supra; Commonwealth v. Young, supra; Commonwealth v. Marshall, supra; Commonwealth v. Stokes, supra; Commonwealth v. Jones, supra; Commonwealth v. Tilley, supra; Commonwealth v. Jasper, supra; Commonwealth v. Williams, supra; Commonwealth v. O'Shea, supra.*

[6] In some instances, the issue was entertained on direct appeal even though the case was tried before *Mills* was announced. *See, e.g., Commonwealth v. Moore, supra; Commonwealth v. Young, supra; Commonwealth v. Stokes, supra; Commonwealth v. Jones, supra; Commonwealth v. Tilley, supra; Commonwealth v. Jasper, supra; Commonwealth v. Young, supra; Commonwealth v. Williams, supra; Commonwealth v. O'Shea, supra; Commonwealth v. Billa, supra.*

[7] *See, e.g., Commonwealth v. Thomas, supra;*

(Continued)

All of these death-sentenced prisoners whose challenges were rejected by the State Supreme Court will seek relief under the panel's decision.[8] As the Attorney General believes that the panel is in grave error, he files this petition *amicus curiae* in support of Respondents, Appellees herein, urging rehearing *en banc*.

(Continued)

Commonwealth v. Holloway, supra; Commonwealth v. Rollins, supra; Commonwealth v. Chester, supra; Commonwealth v. Breakiron, supra; Commonwealth v. Porter, supra; Commonwealth v. Laird, supra; Commonwealth v. Blystone, supra; Commonwealth v. Cross, supra; Commonwealth v. Albrecht, supra; Commonwealth v. Abu-Jamal, supra; Commonwealth v. Whitney, supra; Commonwealth v. Jermyn, supra; Commonwealth v. Henry, supra; Commonwealth v. Hardcastle, supra.

[8] Indeed, the Attorney General is already involved in cases before this Court and the district courts where *Mills* claims are pending. *See Jermyn v. Horn*, 266 F.3d 257 (3d Cir. 2001); *Szuchon v. Lehman*, Nos. 00-9000 & 00-9001 (3d Cir.); *Carpenter v. Horn*, No. 95-9001 (3d Cir.); *Breakiron v. Horn*, No. 00-300 (W.D. Pa.); and *Blystone v. Horn*, No. 99-CV-490 (W.D. Pa.).

ORIGINAL

(8)

No. 02-1603

Supreme Court, U.S.
FILED
JUL 7 2003
CLERK

IN THE

Supreme Court of the United States

MARTIN HORN, Commissioner,
Pennsylvania Department of Corrections;
JAMES E. PRICE, Superintendent of the
State Correctional Institution at Greene;
RAYMOND COLLERAN, Superintendent
of the State Correctional Institution at
Waymart; COMMONWEALTH OF PENNSYLVANIA

Petitioners,

v.

GEORGE E. BANKS

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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MOTION FOR LEAVE TO PROCEED INFORMA PAUPERIS

1. Respondent, George E. Banks, is in the custody of the Commonwealth of Pennsylvania incarcerated at the State Correctional Institution at Graterford under sentence of death and imprisonment.

2. Respondent has been continuously incarcerated since September 25, 1982, and has been without any gainful employment during that time. He has no other source of income.

3. Respondent has proceeded In Forma Pauperis throughout all State Court proceedings in this matter.

4. On March 26, 1999, the United States District Court for the Middle District of Pennsylvania granted Respondent's Application to Proceed In Forma Pauperis in connection with the filing of his petition for Writ of Habeas Corpus pursuant to 28 U.S.C. 2254 and for Stay of Execution.

5. On March 26, 1999, the United States District Court for the Middle District of Pennsylvania appointed undersigned counsel to represent Respondent in his Habeas Corpus proceedings pursuant to 21 U.S.C. 848(q)(B)(7),(8).

Accordingly, Respondent requests that this Court grant him leave to proceed In Forma Pauperis in connection with his Opposition to the Petition for Writ of Certiorari.

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Counsel for Respondent

No. 02-1603

IN THE

Supreme Court of the United States

MARTIN HORN, Commissioner,
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JAMES E. PRICE, Superintendent of the
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Petitioners,

v.

GEORGE E. BANKS

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. COUNTERSTATEMENT OF THE CASE

In September 1982, Banks was arrested for killing thirteen people. Following extensive pretrial hearings that determined that Banks was competent to stand trial, a jury, rejecting Banks' insanity defense, convicted Banks of twelve counts of first degree murder and sentenced him to death on each of those counts. Eight months before this Court's decision in *Mills v. Maryland*, 486 U.S. 367 (1988), Banks' convictions and sentences of death were affirmed on direct appeal. *Commonwealth v. Banks*, 521 A.2d 1 (Pa. 1987), cert. denied, *Banks v. Pennsylvania*, 484 U.S. 873 (1987).

Banks subsequently sought state collateral relief asserting, for the first time, that the sentencing instructions violated *Mills v. Maryland*. The uniqueness of Pennsylvania's appellate review process allowed the *Mills* claim to be raised and determined on the merits under its "relaxed waiver doctrine". The Commonwealth did not assert that *Mills* was non-retroactive. The Pennsylvania Supreme Court determined that the sentencing instructions did not violate *Mills* and again affirmed the sentences of death. *Commonwealth v. Banks*, 656 A.2d 467 (1995), cert. denied, *Banks v. Pennsylvania*, 516 U.S. 835 (1995).

Banks then sought federal habeas relief. His petition was dismissed without prejudice so that he could pursue additional state remedies. *Banks v. Horn*, 126 F.3d 206 (3rd Cir. 1997). State collateral relief was again denied. *Commonwealth v. Banks*, 726 A.2d 374 (Pa. 1999). Banks then re-filed his federal habeas petition, which was denied on the merits by the district court. *Banks v. Horn*, 63 F.Supp. 2d 525 (M.D. Pa. 1999). On appeal, the Third Circuit reversed concluding that the Pennsylvania Supreme Court unreasonably applied *Mills*. In reaching this conclusion, the Third Circuit determined that the resolution of the retroactivity of *Mills* under *Teague v. Lane*, 489 U.S. 288 (1989) was unnecessary because the Pennsylvania Supreme Court itself considered and applied *Mills* (albeit unreasonably) on the merits. *Banks v. Horn*, 271 F.3d 527 (3rd Cir. 2001).

The Commonwealth then filed a petition for writ of certiorari. In granting the writ, this Court held that the Third Circuit must perform a *Teague* analysis before granting relief under *Mills*. This Court reversed and remanded for further proceedings. *Horn v. Banks*, 122 S.Ct. 2147 (2002). On remand, the Third Circuit concluded that *Mills* was not a "new rule" under *Teague*, and reinstated its previous ruling that the Pennsylvania Supreme Court unreasonably applied *Mills*. *Banks v. Horn*, 316 F.3d 228 (3rd Cir. 2003). In a concurring opinion, Judge Sloviter concluded that although *Mills* was a "new rule" under *Teague*, Banks conviction was not final within the meaning of *Teague* until after the denial of his first state collateral relief petition. Judge Sloviter reasoned that the collateral review process under which the Pennsylvania Supreme Court addressed *Mills* on the merits, as required by its unique "relaxed waiver doctrine", was another form of direct review. *Id.*, at 255 (Sloviter, J., concurring).

The Commonwealth of Pennsylvania has again sought review of this case by petition for writ of certiorari.

II. REASONS FOR DENIAL OF THE WRIT

1. THE THIRD CIRCUIT CORRECTLY HELD THAT MILLS WAS DICTATED BY EXISTING PRECEDENT

Mills did not announce a new rule under *Teague v. Lane*, 489 U.S. 288 (1989). The Third Circuit's decision that *Mills* was dictated by the "legal landscape" in place as of October 5, 1987, is firmly rooted in this Court's precedent, is well reasoned and should not be disturbed.

In *Furman v. Georgia*, 408 U.S. 238 (1972), this Court invalidated all death sentences then existing in the various states holding that the Eighth Amendment prohibited the death penalty from being imposed under procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. Four years after *Furman*, this court began the process of considering whether the procedural mechanisms in death penalty statutes ensured that sentences of death would not be inflicted

arbitrarily. See, *Jurek v. Texas*, 428 U.S. 262 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); and *Proffitt v. Florida*, 428 U.S. 242 (1976). In each of these cases, state death penalty statutes had survived Eighth Amendment attacks.

Eight months before *Mills v. Maryland*, 486 U.S. 367 (1988) was decided, this Court, on October 5, 1987, denied certiorari on direct appeal from the Pennsylvania Supreme Court's affirming of Banks' death sentences. *Banks v. Pennsylvania*, 484 U.S. 873 (1987).[1]

At the time of the denial of Banks' certiorari petition, this Court had decided an additional eight pre-*Mill's* cases, which continued the evolution of *Furman*. These cases created the constitutional framework which dictated *Mills*. These cases are, *Woodson v. North Carolina*, 428 U.S. 280 (1976), *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976), *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *Skipper v. South Carolina*, 476 U.S. 1 (1986), *California v. Brown*, 479 U.S. 538 (1987), *Hitchcock v. Dugger*, 481 U.S. 393 (1987), *McCleskey v. Kemp*, 481 U.S. 279 (1987). They embody the Eighth Amendment principle which prohibits government from erecting barriers prohibiting individual jurors giving consideration and effect to mitigating evidence of the character and record of an offender in a death penalty proceeding. In each of these cases, this Court continued *Furman* on its evolutionary path by embarking on a case-by-case analysis of the particular process employed to determine whether that process created a constitutionally impermissible barrier.

Mills is but a part of this evolutionary process. The impermissible barrier in *Mills* was a single juror's holdout vote on the existence of mitigating evidence. *Mills* removed this barrier. The pre-*Mills* line of cases dictated such a result. As this Court recognized in *Mills*, "Under our decision, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by

[1] The Commonwealth erroneously states that "Banks judgment became final in 1986". CP at 5. Under *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994), a conviction becomes final for Teague purposes when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely petition has been finally denied. Based upon this definition, Banks' conviction became final when this Court denied certiorari on October 5, 1987.

statute, *Lockett v. Ohio*, supra; *Hitchcock v. Dugger*, --U.S.--, 107 S.Ct. 1821, 95 L.Ed 2d 347 (1987); by the sentencing court, *Eddings v. Oklahoma*, supra; or by an evidentiary ruling, *Skipper v. South Carolina*, supra. The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. Whatever the cause....the conclusion would necessarily be the same: 'Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*...'*Eddings v. Oklahoma*, 455 U.S., at 117, n.*, 102 S.Ct., at 878, n.* ((O'Conner, J., concurring)." *Mills*, 108 S.Ct., at 1866.

The general principle that a state cannot create, by whatever mechanism, barriers to jurors giving consideration and effect to mitigating evidence does not become new again with each particular impermissible barrier that may subsequently occur. The continued application of a rule that necessarily requires a case-by-case examination of the evidence does not create a new rule under *Teague*. *Williams v. Taylor*, 529 U.S. 362, 382 (2000); *Smith v. Robbins*, 120 S.Ct. 746 (2000). The continued application of the principle announced in the *Woodson-Dugger* line of cases requires a case–by-case examination of the particular evidence at issue to determine whether a constitutionally impermissible barrier exists. Contrary to the Commonwealth's assertion, this continued application does not continually create a "new rule".

The Commonwealth attempts to distinguish these pre-Mills cases by arguing that *Mills* addressed a different problem-"the question of unanimity and that *Mills* went beyond the principle that the jury must be allowed to consider mitigating evidence." CP at 9-10. This argument contradicts the very import and language of *Mills* .If the unanimity requirement of a jury instruction would prevent the jurors from giving due consideration and effect to mitigating evidence, then this requirement creates a barrier in violation of the Eighth Amendment. The source of the barrier is not the relevant consideration. *Mills*, 486 U.S. at 372-375. Furthermore, the Commonwealth's assertion that it is constitutionally permissible

to allow a jury to consider mitigating evidence but, because of a unanimity requirement, the jury could not give it effect in its sentencing decision is without support and has been consistently rejected by this court. See, *Saffle v. Parks*, 494 U.S. 484, 491 (1990) ("*Lockett* and *Eddings* command that the State must allow the jury to give effect to mitigating evidence in the making of a sentencing decision"); *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998) ("Our consistent concern has been that restrictions on the jury's sentencing determination does not preclude the jury from being able to give effect to mitigating evidence." (citing *Lockett*, *Eddings*, *Penry*)).

This Court's *Teague* ruling in *Penry v. Lynaugh*, 492 U.S. 302 (1989), which challenged a conviction that became final on January 13, 1986, also supports the conclusion that *Mills* was dictated by precedent. Like Banks, the habeas petitioner in *Penry* challenged his death sentence on the ground that the jury instructions created a barrier, which precluded a jury from saying "no to the death penalty", based upon mitigating evidence of mental retardation and abused background. In relying on *Woodson*, *Lockett* and *Eddings*, this Court concluded that the rule that *Penry* sought to apply was not new under Teague.

Given this legal landscape, the Third Circuit was correct in concluding that *Mills* represented merely "an application of the well established constitutional rule that the Eighth Amendment prohibits all barriers to the sentencer's consideration of any and all mitigation evidence in the penalty phase of a capital trial." App. 16.

2. THE PENNSYLVANIA SUPREME COURT'S OWN VIEWS SUGGEST THAT MILLS IS BASED ON PRECEDENT

In a *Teague* analysis, the "reasonable views of state courts are entitled to consideration" as part of the legal landscape. *Caspari v. Bohlen*, 510 U.S. 383, 395 (1994). Pennsylvania' own history of capital jurisprudence prior to the State Supreme court's decision in *Banks* reflects adherence to the constitutional directive of the *Woodson-Lockett* line of cases.

In 1974, the Pennsylvania legislature enacted, in response to this Court's holding in *Furman*, a new death penalty statute. Act of March 26, 1974, P.L. 214, No. 46, 18 Pa. C.S.A. 1311. Three years after its enactment, the Pennsylvania Supreme Court found the statute to be unconstitutional because it prevented jurors from considering evidence pertaining to the individual character and history of the defendant. In reaching this conclusion, the state court relied on the general principle embodied in *Woodson*, *Jurek*, *Proffitt* and *Roberts* that a sentencing authority cannot be prohibited from considering mitigating evidence relevant to the character and background of a defendant. *Commonwealth v. Moody*, 476 Pa. 223, 231, 382 A.2d 442 (1977).

On September 13, 1978, the Pennsylvania legislature adopted a new sentencing procedure. 42 Pa. C.S.A. 9711. As the Pennsylvania Supreme Court subsequently noted in *Commonwealth v. Zettlemoyer*, 454 A.2d 937, 500 Pa. 16 (1982), cert. denied, 461 U.S. 970 (1983), this latest version of the sentencing code had responded to this Court's announcement in *Lockett* that a barrier could not be created which permitted only statutorily enumerated mitigating factors to be considered in a death penalty proceeding.

In 1995, when the Pennsylvania Supreme Court was faced on collateral review with Banks' *Mills* claim, it had the benefit of *Woodson*, *Lockett*, *Skipper*, *Eddings* and *Hitchcock*, and a history of capital jurisprudence reflecting some of this Court's pre-*Mills* cases. The State Court had applied the general principle under the *Woodson* and *Lockett* that barriers to the consideration of mitigating evidence are constitutionally impermissible under the Eight Amendment. Under these circumstances, the Pennsylvania Supreme Court's determination of the merits of Banks' *Mills* claim was the result of its own recognition that *Mills* is based upon constitutional precedent.[2]

[2] In *Commonwealth v. Cross*, 535 Pa. 603, 726 A.2d 333 (1999), the Pennsylvania Supreme court concluded without any analysis of *Eddings*, *Lockett* or *Hitchcock*, that *Mills* was a "new rule"; nevertheless the court addressed the merits of *Mills* concluding that there was no violation.

3. UNDER TEAGUE, THE FEDERAL HABEAS COURTS WERE CORRECT IN APPLYING MILLS BECAUSE THE PENNSYLVANIA SUPREME COURT HAD APPLIED MILLS

The Pennsylvania Supreme Court actually applied *Mills* in this case, albeit in a manner that the Third Circuit deemed objectively unreasonable. See, *Banks*. 656 A.2d at 470-72. Under a unique state appellate review process, where the state court has actually applied *Mills*, *Teague* allows the federal habeas court to also apply *Mills*.

Though recognizing that Banks' *Mills* claim was being raised for the first time on collateral review, the Pennsylvania Supreme Court nevertheless addressed the merits of this claim. The Pennsylvania courts approach was consistent with and dictated by its "relaxed waiver doctrine" first announced in *Commonwealth v. McKenna*, 476 Pa. 428, 440-441, 383 A.2d 174, 181 (1978). Under this state doctrine, which is predicated on *Woodson*, the standards by which a sentence of death is fixed must be constitutionally beyond reproach. Because the imposition of such a sentence is irrevocable in its finality, consideration of constitutional issues challenging the death penalty cannot be waived. This doctrine was designed "to prevent the court from being instrumental in an unconstitutional execution." *Commonwealth v. Albrecht*, 554 Pa. 31, 720 A.2d 693, 700 (1998).[3]

Teague is a doctrine of comity, which works in conjunction with the rule on exhaustion. The exhaustion rule "serves to minimize friction between our federal and state systems of justice by allowing the state an initial opportunity to pass upon and correct alleged violations of a prisoners' federal rights." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981). Teague avoids the insult to state court judgments that would occur if the state courts (during the exhaustion process) "faithfully apply existing constitutional law only to have a federal court discover, during a habeas proceeding, new constitutional commands."

[3] In *Commonwealth v. Albrecht*, supra, the Pennsylvania Supreme Court decided that it would no longer apply the "relaxed waiver doctrine" in collateral review proceedings. Recently, in *Commonwealth v. Freeman*, 2003 WL 21255941 (Pa. May 30, 2003), the Pennsylvania Supreme Court adopted a new general rule, which abolished the "relaxed waiver doctrine" on direct appeal in capital cases unless the waived claim is of particular constitutional magnitude that it should be reached on appeal.

Teague, 489 U.S., at 310. Therefore, if *Mills* announced a new rule, *Teague* would preclude federal habeas courts from applying *Mills* if the claim had been litigated in the state court before *Mills* was decided.

In this case, the *Mills* claim was fully litigated in state court after *Mills* was decided, and the state court actually applied *Mills* to the claim. Since the state court had a full opportunity to and actually did apply *Mills* to this claim, comity is not offended by applying *Mills* in federal habeas review. Adoption of the Commonwealth's position would create a bizarre rule that would forbid a federal court from applying exactly the same precedent that was applied by the state court.

Concepts of finality are also not offended in retroactively applying *Mills* within the unique circumstances of this case, assuming *Mills* is a new rule. A state conviction and sentence becomes final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied. *Caspari*, 510 U.S., at 390. Although Banks' direct appeal had been technically exhausted, Pennsylvania's relaxed waiver doctrine effectively treats collateral relief petitions in the death penalty context like a direct appeal. Under these unique circumstances, Banks conviction was not final within the meaning of Teague until 1995 when the Pennsylvania Supreme Court affirmed the denial of his collateral relief petition and this Court denied his petition for writ of certiorari.[4] See, App. 52-57.

4. THE DECISIONS OF OTHER COURTS SUPPORT THE CONCLUSION THAT MILLS WAS DICTATED BY PRECEDENT

In *Gall v. Parker*, 231 F.3d 265, 322-23 (6th Cir. 2001), the Sixth Circuit held that *Mills* was not a "new rule" and could be applied retroactively to a conviction that became final in 1981. *Gall* reasoned that *Lockett* dictated *Mills*.

[4] In light of the Pennsylvania Supreme Court's recent decision in Commonwealth v. Albrecht, supra, this unique situation is unlikely to reoccur.

In *Hopkinson v. Shillinger*, 781 F.Supp..737 (D. Wyo. 1991), *aff'd*, 954 F.2d 609 (10th Cir. 1992), the district court reasoned that *Mills* did not announce a new rule for a conviction that became final after *Lockett* and *Eddings*; "the Eighth Amendment prohibits barriers to consideration of mitigating evidence whether they result from evidentiary rulings, statute or jury instructions....*Mills* and *McKoy* are simply different factual applications of that established principle and are applicable here." *Hopkinson*, 781 F.Supp. at 742.

DeShields v. Snyder, 829 F.Supp. 676 (D. Del (1993), held that "the rule announced in *Mills* is not a new rule within the meaning of Teague as the result was dictated by *Lockett* and *Eddings*.

5. DECISIONS THAT HAVE DEEMED MILLS "NEW" ARE DEVOID OF REASONING AND DISTINGUISHABLE

The Commonwealth relies on *Miller v. Lockhart*, 65 F.3d 676, 685-86 (8th Cir. 1995), *Cordova v. Collins*, 953 F.2d 167, 173 (5th Cir. 1992) and *Williams v. Dixon*, 961 F.2d 448, 456 (4th Cir. 1992) for its position that the Circuits are split as to whether *Mills* constitutes a "new rule" for *Teague* purposes. CP at 5-6.

In *Cordova*, the Fifth Circuit provided no rationale whatsoever for its conclusion that *Mills* announced a new rule. *Cordova*, 953 F.2d at 173. Similarly, *Miller* offers little rationale for its holding. In *Miller*, the petitioner's conviction became final in 1981, so only the plurality opinion in *Lockett* was part of the relevant legal landscape for *Teague* purposes. In comparison, Banks had the benefit of *Eddings*, *Skipper* and *Hitchcock*, which together with *Lockett*, formed the basis for *Mills*.

Contrary to the Commonwealth's assertion, *Williams* did not conclude that *Mills* announced a "new rule". Rather the *Williams* court concluded that *Mills* fit within the second *Teague* exception. *Williams* did note that a previous Fourth Circuit panel, *McDougal v. Dixon*, 921 F.2d 518, 539 (4th cir. 1990) had indicated in dicta that *Mills* was "new", but *Williams* did not adopt that statement. *Williams*,

961 F.2d at 453 n.3; *Banks*, 316 F.3d at 246 n. 15. *McDougal* itself contains no analysis but simply notes that *Mills* was decided eight years after petitioner's conviction.

Pennsylvania's capital appeals process under which the *Mills* claim was decided is unique and distinguishable from the procedures utilized in the cases relied upon by the Commonwealth. The Commonwealth failed to address this uniqueness. The very meaning of "finality" for *Teague* purposes takes a very different turn in Pennsylvania as opposed to the other circuit decisions cited by the Commonwealth. Because of this difference, the split suggested by the Commonwealth is not applicable to this case.

6. THE THIRD CIRCUIT WAS CORRECT IN ITS DECISION THAT THE PENNSYLVANIA SUPREME COURT'S REJECTION OF THE MILLS CLAIM WAS UNREASONABLE

Under 28 U.S.C. 2254 (d) (1) a federal writ can be granted only if a state court decision "was contrary to, or involved an unreasonable application of clearly established precedent of this court". In *Wiggins v. Smith*, 2003 WL 21467222 (U.S. 2003), this Court concluded that the unreasonable application prong of section 2254 (d) (1) permits a writ to be granted when the state court identifies the correct governing legal principle but unreasonably applies it to the facts of petitioners case. The state court decision must be objectively unreasonable, not just incorrect or erroneous.

In its 2001 opinion, the Third Circuit had concluded that the Pennsylvania Supreme Court had unreasonably applied Mills in determining whether the jury instructions and verdict slip violated the Eighth Amendment. App. 115, 119. This Court did not grant certiorari on this issue, which was also raised by the Commonwealth in its original petition. In its 2003 opinion, the Third Circuit reinstated this conclusion and its analysis. App. 38. The Commonwealth again seeks review of this conclusion.

In its analysis, the Third Circuit acknowledged that it was governed by section 2254 (d) (1). App. 104. The Court further recognized and carefully applied the *Boyde* standard in determining whether the

jury instruction complied with *Mills*. App. 109. Under *Boyde*, a jury instruction fails to comply with *Mills* if there is a reasonable likelihood that the entire jury applied the instruction in an improper manner. *Boyde v. California*, 494 U.S. 370, 380 (1990).

Adhering to section 2254 (d) (1) standard and applying the principles of *Boyde* to Banks' *Mills* claim, the Third Circuit carefully examined the entire jury instruction. App. 110-111. The Court further examined the Pennsylvania Supreme Court's application of *Mills* to that instruction. The Third Circuit properly found from the record that the Pennsylvania Supreme Court never examined the entire jury instruction, but merely looked at one part of it and found that it was acceptable because it followed certain statutory provisions and did not "infer a requirement of unanimity. App. 109. The Third Circuit was correct in its conclusion that the Pennsylvania Supreme Court's application of Mills was unreasonable because it never examined the entire instruction nor did it question whether a reasonable jury could have concluded that unanimity was required to find mitigating evidence. App. 109.

In examining the jury instruction itself, those instructions, as the Third Circuit properly concluded, were ambiguous and allowed a jury to infer that unanimity was required for mitigating circumstances. App. 114-115. Those instructions repeatedly referenced "unanimity" in conjunction with "aggravating and mitigating circumstances" and specifically required the jurors to "agree" on their "findings". The instructions defined "findings" as including mitigating circumstances. App. 110-111, n.23.

In examining the *Mills* claim as to the verdict slip, the Third Circuit correctly found that the Pennsylvania Supreme Court unreasonably concluded that there was no *Mills* violation without ever examining the content and implications of the slip and without employing the proper inquiry. App. 119. That form suggests the need for jury unanimity on mitigating evidence and no additional language is employed implicating a differing standard for aggravating and mitigating evidence. App. 116-118.

Under these circumstances, the instructions and verdict slip do not pass the *Boyde* test and the decision of the Pennsylvania Supreme Court represents an unreasonable application of *Mills*.[5]

III. CONCLUSION

For the reasons set forth above, respondent respectfully requests that this Court deny the petition for writ of certiorari.

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[3] Because the Third Circuit held that Mills was not a new rule, it did not address whether Mills satisfies one of Teague's exceptions to non-retroactivity. Banks, 316 F.3d at 235 n. 5. Since one does not know how the Third Circuit would rule, Banks does not address that issue here, although he does not waive any argument regarding that issue.

Supreme Court, U.S.
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NO. 02-1603

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, Commissioner, Pennsylvania Department of Corrections; JAMES PRICE, Superintendent of State Correctional Institution at Greene; RAYMOND J. COLLERAN, Superintendent of State Correctional Insitution at Waymart; COMMONWEALTH OF PENNSYLVANIA,
Petitioners,

v.

GEORGE E. BANKS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY

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ARGUMENT IN REPLY

In his Response to the Petition for Writ of Certiorari, Banks argues that Mills v. Maryland, 486 U.S. 367 (1988), did not announce a new rule within the meaning of Teague v. Lane, 489 U.S 288 (1989). He insists, as a result, that Mills is not governed by the Teague rule of non-retroactivity, and may be applied to his older conviction. Banks also insists that the instructions in this case did indeed violate Mills, and that the Pennsylvania courts were unreasonable in holding otherwise. Petitioners disagree, as explained in the Petition for Writ of Certiorari, and for the most part will continue to rely on the arguments contained in their Petition.

Banks offers one new argument in his Response, however, which calls for a short additional reply.

Teague v. Lane does not become irrelevant if the state court rejects the claim on its merits.

Banks argues (in the alternative) that, even if Mills announced a new rule which would normally be non-retroactive, it should be applied here. He notes that the Pennsylvania Supreme Court did not address the question of retroactivity; rather, that Court considered and rejected the Mills claim on the merits. He concludes that since the *state court* did not tackle the retroactivity issue, the *federal court* should not do so either. *Response* at 7-8. This is the argument made by Judge Sloviter in her concurring opinion below; Banks urges this Court to adopt Judge Sloviter's reasoning.

There are several problems with this argument. The most obvious is that it this Court already *rejected* it last year, in this very case. See App.61-68. This Court held that federal courts sitting in habeas are obliged to address the retroactivity issue where it is properly raised by the state, even though the retroactivity question had not been considered by the state courts. The Court explained that this result was compelled by Caspari v. Bohlen, 510 U.S. 383 (1994): If the state raises the retroactivity issue, the federal habeas court *must* address it as a threshold matter, even if the state courts did not. App. 67-68.

Banks, and Judge Sloviter, employ some peculiar logic in their attempt to evade this Court's earlier directive. Last year, Banks argued that Teague is simply irrelevant if the state court did not first consider the retroactivity issue. Banks now concedes (as he must) that Teague is relevant, but argues that it is merely a rule of comity, and it imposes no retroactivity bar if the state court has considered the merits of the underlying claim. In other words, Banks reluctantly "applies" Teague to claims addressed on the merits by the state court, and finds that Teague never bars them. He thus ends up exactly where he began – arguing that there is *never* a retroactivity bar to claims addressed on the merits by the state court. But this circular approach, in addition to being at odds with Caspari, is premised on a woefully incomplete statement of Teague's purpose. The rule of non-retroactivity does not merely ensure that federal courts will never consider a constitutional theory not addressed by the state courts. The non-retroactivity principle is an independent restraint; it promotes "evenhanded justice" by ensuring that similarly situated defendants will be treated similarly. Teague, 489 U.S. at 300. Its operation also guarantees that old convictions are not continually open for reassessment and

attack. It ultimately provides closure -- not merely to state criminal process, but to victims and their families as well – and thus promotes confidence in, and respect for, the criminal justice system.

Banks and Judge Sloviter also argue (without a great deal of explanation) that there is something "unique" about the Pennsylvania Supreme Court's treatment of capital cases that fundamentally changes the appellate process, and effectively *postpones* final judgment. They focus on the state supreme court's past practice of relaxing its waiver rules in death penalty cases – a discretionary practice that was not always followed – and contend that this "relaxed waiver" effectively extended the direct appeal. Because Teague only prohibits retroactive application of new rules that are created *after* the completion of direct review, this would remove any retroactivity problem. In other words, Banks and Judge Sloviter contend that Banks' direct appeal did not really end, for purposes of the Mills/Teague analysis, until the Pennsylvania Supreme Court rejected the Mills claim on the merits in 1995.

But this makes no sense. Such a rule would render the date of final judgment entirely unpredictable and perpetually subject to re-opening. Indeed, there is always the possibility that a state court may decide to hear a claim on its merits, despite a procedural bar; if it does so, that does not destroy the finality of a concluded direct appeal. Indeed, neither this Court, nor any other Court of which the Commonwealth is aware, has ever held that the date of final judgment in a criminal case is re-set whenever the state courts hear the merits of a claim on collateral review. That is why neither Banks nor Judge Sloviter provides any authority for this "extended direct appeal" theory.

In fact, the law is the opposite. For example, in Sawyer v. Smith, 497 U.S. 227 (1990), this Court applied the Teague rule under almost identical circumstances: the state courts had considered and rejected Sawyer's Caldwell[1] claim on the merits on collateral review. There was no "extension" of Sawyer's direct appeal; the general rule against retroactivity remained the same.

Banks and Judge Sloviter stress that Pennsylvania's "relaxed waiver" is "unique," and presumably this means that the outcome here should be different from Sawyer. But they do not explain what makes Pennsylvania's system different, or why these differences matter. They seem to assume that "relaxed waiver" was mandatory and applied to all possible claims at all possible times, thus converting direct appeal of Pennsylvania death penalty cases into an endless process. But this is not so, as explained by the Pennsylvania Supreme Court in Commonwealth v. Freeman, 827 A.2d 385, 400 n.9 (Pa. 2003): "The relaxed waiver practice … was not absolute, but discretionary. This Court declined to invoke the doctrine in many instances . …"

In any event, the frequency of "relaxed waiver" does not undermine the rule against retroactivity. A state may reserve the power to re-examine older cases without postponing the date of final judgment, even if the state exercises this power *often*. The finality of a judgment is not undone by later collateral review – either under federal law, see Clay v. United States, 123 S. Ct. 1072, 1076 (2003) (for purposes of postconviction relief, finality attaches when

[1] Caldwell v. Mississippi, 472 U.S. 320 (1985).

direct review is complete), or under Pennsylvania law, Commonwealth v. Tedford, 781 A.2d 1167, 1170-71 (Pa. 2001) ("a judgment of sentence becomes final once an appellant's means of direct review of a conviction … have concluded or the time limits for seeking an appeal have expired"). The possibility of additional review does not undermine the finality of the judgment. See also Restatement (Second) of Judgments, § 13, comment note f (1980) (judgment remains final even where there exists possibility that it may later be set aside). Indeed, the Pennsylvania Supreme Court itself defined Banks's date of final judgment as the conclusion of his direct appeal, for purposes of calculating the time limit for collateral review – despite the Court's use of "relaxed waiver" to reach (and reject) several additional claims on an earlier round of collateral appeal.[2] Commonwealth v. Banks, 726 A.2d 374, 375 (Pa. 1999).

The Pennsylvania Supreme Court's past practice of relaxing its rules of waiver in capital cases was no great mystery. It was simply a tool by which the state supreme court could, in its discretion, review claims. This practice did not extend the direct appeal indefinitely, and it has no effect on retroactivity analysis.[3]

[2] Banks points out in his *Response* that, in the *Petition*, the Commonwealth mis-stated the date of his final judgment as 1986 instead of 1987 (*Response* at 3 n.1; *Petition* at 5). The Commonwealth apologizes for this inadvertent error, which does not change the Teague analysis, since Mills was decided in 1988. The *Petition* correctly sets out the dates of Banks' direct appeal at 3.

[3] This is not the first attempt by Pennsylvania capital defendants to stretch Pennsylvania's "relaxed waiver"

doctrine far beyond its limited purpose, into mandatory *de novo* review of every claim in every capital case. The doctrine of "relaxed waiver" began as a safety net, with which the state supreme court could catch egregious errors that death-sentenced defendants may not otherwise have had the opportunity to raise. Such a mechanism was necessary, in the eyes of the Court, because death penalty procedures were uncertain – the Pennsylvania death penalty statute was new, and the availability of collateral review in capital cases remained unclear. See Commonwealth v. Zettlemoyer, 454 A.2d 937, 955 n.19 (Pa. 1982), cert. denied, 461 U.S. 970 (1983).

Subsequent experience has proven that all capital prisoners in Pennsylvania have the opportunity to seek collateral relief. Even capital defendants who have refused to raise *any* claims on direct appeal are still afforded collateral review. E.g., Commonwealth v. Appel, 689 A.2d 891 (Pa. 1997). Nevertheless, the capital defense bar has consistently sought to expand "relaxed waiver" beyond any rational boundary. This led to a series of stern warnings from the Pennsylvania Supreme Court that death-sentenced prisoners are obliged to raise their claims in a timely fashion, just like all other litigants. See, e.g., Commonwealth v. Williams, 660 A.2d 1316, 1320 (Pa. 1995), cert. denied, 516 U.S. 1051 (1996); Commonwealth v. O'Donnell, 740 A.2d 198, 204 (Pa. 1999). Finally, after continued abuse of the doctrine, the Court eventually announced that "relaxed waiver" would no longer be invoked on collateral review. Commonwealth v. Albrecht, 720 A.2d 693 (Pa. 1998). Most recently, the Court held that the practice would no longer be available even on direct appeal. Freeman, 827 A.2d at 402.

Thus, the Pennsylvania Supreme Court has rejected defense attempts to convert "relaxed waiver" into a mandatory, endless appeal process. This Court should do the same, by rejecting Banks' theory that "relaxed waiver" amounted to an indefinite postponement of final judgment.

CONCLUSION

For the reasons set forth above, as well as the reasons given in their initial brief, petitioners respectfully request that this Court grant the Petition for Writ of *Certiorari*.

Respectfully submitted,

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No. 02-1603

IN THE

Supreme Court of the United States

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections, et al.,
Petitioners,

vs.

GEORGE E. BANKS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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25 pp

QUESTIONS PRESENTED

1. Did *Mills* v. *Maryland* create a "new rule" within the meaning of *Teague* v. *Lane*, such that it does not apply retroactively to overturn judgments which became final before it was announced?

2. Was the Pennsylvania Supreme Court's decision in this case, that jury instructions which track the wording of the Pennsylvania statute comply with *Mills*, "contrary to or . . . an unreasonable application of clearly established Federal law" within the meaning of 28 U. S. C. § 2254(d)(1)?

IN THE

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JEFFREY A. BEARD, Secretary,
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Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation[1] respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition for writ of certiorari in this case. Counsel for petitioners has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The rules of *Teague* v. *Lane* and 28 U. S. C. § 2254(d) are important and independent limitations on collateral review. The Court of Appeals' erroneously narrow interpretation of these rules will needlessly delay enforcement of the death penalty, reducing its deterrent effect. These delays are contrary to the rights of victims and society which CJLF was formed to advance.

June, 2003

Respectfully submitted,

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IN THE

Supreme Court of the United States

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections, et al.,
Petitioners,

vs.

GEORGE E. BANKS,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

Over twenty years ago, George Banks "shot fourteen people . . . killing thirteen and wounding one." *Commonwealth* v. *Banks*, 521 A. 2d 1, 3 (Pa. 1987), cert. denied, *Banks* v. *Pennsylvania*, 484 U. S. 873 (1987). The dead included seven children. See *id.*, at 5. He was sentenced to death in 1983. *Id.*, at 3. Despite the absence of any doubt regarding his identity as the perpetrator, see *id.*, at 8, the execution of the judgment has been delayed for two decades of repetitive review, including a direct appeal, two state collateral reviews, two federal habeas petitions, and associated appeals and petitions for certiorari. See *Banks* v. *Horn*, 63 F. Supp. 2d 525, 530-531 (MD Pa. 1999).

In the current round, the United States Court of Appeals for the Third Circuit denied most of his claims, but it vacated the death sentence based on its disagreement with the Pennsylvania

Supreme Court regarding the application of *Mills* v. *Maryland*, 486 U. S. 367 (1988), a precedent established after Banks' sentence became final on direct review. See *Banks* v. *Horn*, 271 F. 3d 527, 540-541 (CA3 2001).

This Court granted certiorari and summarily reversed in *Horn* v. *Banks*, 536 U. S. 266 (2002) (*per curiam*). The *per curiam* opinion confirmed that the nonretroactivity rule of *Teague* v. *Lane*, 489 U. S. 288 (1989) remains an independent limitation on federal habeas corpus and remanded for determination of whether *Mills* was a new rule. 536 U. S., at 272.

On remand, the Third Circuit panel divided. The two-judge majority held that *Mills* was not a new rule within the meaning of the *Teague* line of cases. *Banks* v. *Horn*, 316 F. 3d 228, 229-230 (CA3 2003). The third judge believed *Mills* was a new rule, but also believed that when a state court waives its procedural default rule and considers on collateral review a claim that could have been raised on direct appeal, the case is not "final" within the meaning of *Teague* until the completion of the collateral review. *Id.*, at 255 (Sloviter, J., concurring).[1] The Commonwealth of Pennsylvania, through the Secretary of its Department of Corrections, has again asked this Court to review the case via a petition for writ of certiorari.

SUMMARY OF ARGUMENT

The Court of Appeals in the present case found the rule of *Teague* v. *Lane* difficult to apply, and it is evident that further instruction is needed. The Court of Appeals' opinion comes close to a catalog of all the ways this Court has said *not* to conduct the *Teague* inquiry: (1) defining "rules" at an excessive level of generality; (2) holding that an outcome is "dictated" because it implements policies of earlier cases, while ignoring countervailing indications of other cases; (3) inadequately surveying the legal landscape, especially ignoring state court opinions; (4) relying on nonconstitutional decisions governing only federal criminal cases, which do not impose those rules on the states; (5) disregarding the close division in the rule-making case itself; and (6) giving no weight to settled practice.

1. Judge Sloviter made no attempt to reconcile her unique definition of finality with the fact that this Court applied the usual definition in identical circumstances in *Sawyer* v. *Smith*, 497 U. S. 227 (1990). See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Horn* v. *Banks*, No. 01-1385, pp. 4-5.

On the merits, it is also evident that the rule of *Mills* v. *Maryland* and *McKoy* v. *North Carolina* needs clarification. As Justice Kennedy noted in his *McKoy* concurrence, a rule requiring the jury to be unanimous *either way* on mitigating circumstances is not only permissible but desirable. Courts and legislatures are adopting the "every juror for himself" rule in the mistaken belief that *Mills* and *McKoy* require it. This is contrary to the evenhandedness principle of *Furman* v. *Georgia* and contributes to arbitrariness in capital sentencing.

On the application of 28 U. S. C. § 2254, the Court of Appeals quoted and used a standard of "independent judgment" that was expressly and emphatically rejected by this Court in *Williams* v. *Taylor*.

ARGUMENT

I. The present case illustrates that further guidance is needed on the definition of "new rule."

A. New Rules.

Mills v. *Maryland*, 486 U. S. 367 (1988) involved a standard jury instruction that had been created by a rule of court, promulgated by the highest court of a state on recommendation of its rules committee, used in that state for nearly a decade, and upheld 6-1 by the state high court. *Mills* v. *State*, 527 A. 2d 3 (Md. 1987). Four Justices of this Court also believed the instruction was constitutional. See 486 U. S., at

390 (Rehnquist, C. J., dissenting). Yet the Court of Appeals for the Third Circuit in the present case held that "no reasonable jurist could have reached a different result" than did the bare majority in *Mills*. See *Banks* v. *Horn*, 316 F. 3d 228, 239 (CA3 2003).

The rule of *Teague* v. *Lane*, 489 U. S. 288 (1989) requires that for *Mills* to be an "old rule," "the unlawfulness of [the instruction must have been] *apparent* to all reasonable jurists" before the *Mills* decision. *Lambrix* v. *Singletary*, 520 U. S. 518, 527-528 (1997) (emphasis added). The Court of Appeals majority in the present case held that a different result in *Mills* would not only have been " 'illogical' or 'grudging' " but "completely untenable." 316 F. 3d, at 242-243. In other words, the committee that drafted the Maryland rule, the court that adopted it, six judges of the Maryland Court of Appeals, and four Justices of this Court were all unreasonable. Such a holding would be worthy of this Court's review by itself. It is even more so in light of the conflicting authorities noted in the petition for certiorari. See Pet. for Cert., part I.

Teague is one of the most important doctrines of this Court's recent jurisprudence, navigating the difficult and murky channel between enforcement of the Bill of Rights and respect for both federalism and the finality of criminal judgments. It has been the subject of numerous decisions of this Court. *Teague* remains important after enactment of the Antiterrorism and Effective Death Penalty Act of 1996 for the reasons stated in Part I-B, *infra*, at 11. To find this doctrine so badly misunderstood and misapplied this late in its development is surprising and, frankly, suspicious. To hold that a rule is not new when it so plainly meets the definition repeated and explained in so many of this Court's decisions smacks of the kind of deliberate evasion that we last saw in the heat of the civil rights struggle of the 1950s and 1960s. Cf. *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964).

Nonetheless, if we generously attribute the Court of Appeals' decision in the present case to misunderstanding rather

than evasion, it is apparent that further instruction is needed. Indeed, the Court of Appeals' opinion itself seems to invite clarification, noting *Teague*'s now 14-year-old statement that "it is 'often difficult to determine' whether a case announces a new rule . . . ." 316 F. 3d, at 233 (quoting 489 U. S., at 301). That task should be considerably easier today, with the numerous examples of what are and are not new rules, just as the law of "probable cause" has acquired content through appellate application, even though it is not governed by rigid rules. See *Ornelas* v. *United States*, 517 U. S. 690, 697 (1996).

The opinion in the present case comes close to a catalog of all the ways this Court has held that federal courts should *not* conduct the *Teague* "new rule" inquiry. They include (1) defining "rules" at an excessive level of generality; (2) holding that an outcome is "dictated" because it implements policies of earlier cases, while ignoring countervailing indications of other cases; (3) an inadequate survey of the legal landscape, especially ignoring state court opinions; (4) relying on nonconstitutional decisions governing only federal criminal cases, which do not impose those rules on the states; (5) disregarding the close division in the rule-making case itself; and (6) giving no weight to settled practice.

1. Excessive generality.

The most common error in *Teague* analysis is defining the pre-existing rule at an excessive level of generality. Habeas petitioners seeking to avoid a *Teague* bar routinely assert that the particular rule they seek to invoke is merely an application of some earlier, sweeping principle. *Sawyer* v. *Smith*, 497 U. S. 227, 236 (1990) expressly rejected this approach. "But the test would be meaningless if applied at this level of generality."

The Court of Appeals in the present case held that "*Mills* represented merely an application of the well established constitutional rule that the Eighth Amendment prohibits *all* barriers to the sentencer's consideration of any and all mitigation evidence . . . ." 316 F. 3d, at 235 (emphasis added). This

statement is excessively broad in two respects. First, the established Eighth Amendment rule was not that broad in 1987, and it is not that broad today. Second, the specific holding of *Mills* that Maryland's standard instruction violated the rule of *Lockett* v. *Ohio*, 438 U. S. 586 (1978) was by no means beyond reasonable debate.

On the first point, it simply is not and never has been true that the Eighth Amendment prohibits *all* barriers. Many states, including Maryland, require the defendant to prove the existence of a mitigating circumstance by a preponderance of the evidence before it may be considered, and this requirement is valid. See *McKoy* v. *North Carolina*, 494 U. S. 433, 444 (1990) (White, J., concurring); *id.*, at 456 (Kennedy, J., concurring in the judgment). Many states apply their standard rules of evidence to the penalty phase, excluding hearsay, unproven scientific claims, and other unreliable evidence. See, *e.g.*, *People* v. *Phillips*, 22 Cal. 4th 226, 237-238, 991 P. 2d 145, 152 (2000). While there are some constitutional limits on exclusion of defense evidence in the penalty phase, see, *e.g.*, *Green* v. *Georgia*, 442 U. S. 95, 97 (1979) (*per curiam*), this Court has not yet construed the Eighth Amendment to require admission of third-hand gossip or phrenology.

Sawyer would seem to be clear enough on its face that the newness of rules is determined at the specific, nuts-and-bolts level and not in sweeping generalities. The opinion in the present case, however, demonstrates that the point requires reinforcement.

2. Dictated by precedent.

Closely related to the excessive generality problem is the Court of Appeals' evasion of the oft-repeated plain language of *Teague* that a rule is new unless "*dictated* by precedent existing at the time . . . ." 489 U. S., at 301 (emphasis in original). The Court of Appeals opined that if this requirement were applied "narrowly," that is, if it means what it plainly says, it would "unrealistically require courts to have anticipated all future

scenarios in order for later cases to not announce a new rule." 316 F. 3d, at 240. This is hyperbole. No one claims that an old rule must catalog every possibility. A novel but outrageous practice can be a clear violation of established law. See *United States* v. *Lanier*, 520 U. S. 259, 271 (1997). What "dictated by precedent" requires is that a judge of a lower court cannot honestly rule the other way without violating the requirements of *stare decisis*, however strongly he or she may disagree with the decision as a matter of policy.

The Court of Appeals' majority's discomfort with "dictated" and its substitution of a different standard is remarkably similar to the argument rejected in *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990).

> "But the fact that a court says that its decision is . . . 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule' under *Teague*. Courts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts."

It was quite debatable at the time of *Mills* whether a requirement of jury unanimity constituted a "barrier" to consideration in violation of *Lockett* or a regulation of the method by which the jury would "consider" the evidence. Indeed, two years after *Mills*, this Court relied on the "what versus how" distinction to hold that a habeas petitioner was seeking to create a new rule when he wanted juries to be able to consider sympathy evoked by his mitigating evidence. "There is a simple and logical difference between rules that govern what factors the jury must be permitted to consider . . . and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Saffle* v. *Parks*, 494 U. S. 484, 490 (1990). *Johnson* v. *Texas*, 509 U. S. 350, 372-373 (1993) (quoting *Saffle*), a direct appeal case decided without *Teague* constraints, confirms that the

what/how distinction is alive and well and follows from *Jurek* v. *Texas*, 428 U. S. 262 (1976).

Before *Mills*, a reasonable jurist could conclude that a rule on the jury's vote on mitigating circumstances fell into the "how" category, just as the rule on burden of proof does to this day. A jury that deliberates and votes on whether a factor has been proven *has* "considered" that factor in the ordinary sense of the word. If a State can "structure the consideration," *Johnson*, 509 U. S., at 373, can it not require that all jurors come to an agreement?

The Third Circuit explains its view that the what/how argument "[w]hile perhaps viscerally appealing . . . does not withstand scrutiny." 316 F. 3d, at 245. In other words, it fails on the merits. Perhaps so, but that is not the question. A reasonable jurist in 1987 could have understood *Jurek* to hold that states have substantial authority to structure *how* juries consider mitigating factors, as *Johnson* confirms it did, that this holding of *Jurek* survives *Lockett*, as *Johnson* also confirms, and that jury voting requirements came within this authority. The newness of *Mills* cannot be evaluated by looking only at *Lockett* and ignoring the "tension" between it and *Furman*/*Jurek*. See *Tuilaepa* v. *California*, 512 U. S. 967, 973 (1994).

3. Survey of the legal landscape.

The Court of Appeals in the present case limited its survey of the legal landscape to this Court's precedents. 316 F. 3d, at 235, and n. 6. In *Caspari* v. *Bohlen*, 510 U. S. 383, 394-395 (1994), this Court admonished quite clearly that it is error to look only at federal cases and ignore the state court decisions. It is even greater error, in most cases, to look only at this Court's precedents. Of course, if there were a Supreme Court precedent squarely on point, there would be no need to look further. However, in 1987 there was not a single case on the question of what to do when a jury is divided on a finding of a mitigating circumstance. All the relevant Supreme Court

precedents were at a higher level of generality. The relevant pre-*Mills* legal landscape therefore included state court decisions of the questions of whether the *Lockett* rule affected jury voting on the circumstances and, if so, whether instructions like the Maryland form violated the rule.

An adequate survey, at the very minimum, would have to include the Maryland decision in *Mills* itself, *Mills* v. *State*, 527 A. 2d 3, 15 (Md. 1987), and the North Carolina decisions in *State* v. *Kirkley*, 302 S. E. 2d 144, 156-157 (N.C. 1983), and *State* v. *Brown*, 358 S. E. 2d 1, 25 (N.C. 1987) (reaffirming *Kirkley*). With two state supreme courts rejecting *Mills*-type claims and no cases accepting such claims, despite established practice in at least two states,[2] the legal landscape as of 1987 indicates strongly that *Mills* was a new rule.

4. Nonconstitutional precedents.

Only two circuits have held that *Mills* was not a new rule: the Third Circuit in the present case and the Sixth Circuit in *Gall* v. *Parker*, 231 F. 3d 265 (CA6 2000). Both decisions rely on *Andres* v. *United States*, 333 U. S. 740 (1948). Aside from the fact that *Andres* involved the final penalty decision and not a preliminary question of mitigating factors, there is a glaring error in this reliance, which this Court quite specifically addressed in *Sawyer* v. *Smith*, *supra*.

In that case, the petitioner maintained that "*Caldwell* [v. *Mississippi*, 472 U. S. 320 (1985)] applied an old rule" because many state courts had adopted similar nonconstitutional rules. 497 U. S., at 240. The *Sawyer* Court held that the fact that a constitutional rule "is congruent with pre-existing state law" does not prevent it from being a new rule. *Id.*, at 240-241. Similarly, a rule established by this Court for federal courts

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2. We say at least two because we do not believe that instructions such as Pennsylvania's violate *Mills*. See Part II, *infra*. However, if one assumes *arguendo* that Banks would prevail on the merits, then there would be more.

under its supervisory powers or federal statutory interpretation does not engraft that rule on to the Constitution and make it binding on state courts. A decision elevating that rule to constitutional status and striking down contrary state practice is a new rule. See *Goeke* v. *Branch*, 514 U. S. 115, 119 (1995) (*per curiam*) (federal case limiting fugitive dismissal rule was supervisory, not constitutional). The Third and Sixth Circuits' reliance on *Andres* to support the proposition that *Mills* was not a new rule is clear error, contrary to *Sawyer* and *Goeke*.

5. Close division.

A fifth factor given short shrift by the Court of Appeals, see 316 F. 3d, at 243, was the close division in *Mills* itself. This is, in part, due to the majority's excessive generality in the definition of the rule, discussed *supra*, at 5. However, this Court has noted more than once that disagreement in the case in question "suggests that the rule announced there was, in light of this Court's precedents, 'susceptible to debate among reasonable minds.'" *O'Dell* v. *Netherland*, 521 U. S. 151, 159-160 (1997) (quoting *Butler*, 494 U. S., at 415, and citing *Sawyer*, 497 U. S., at 236-237).

6. Established practice.

Finally, there is the fact that *Mills* struck down a standard instruction prescribed by rule and used in every Maryland capital case for many years. In *Gilmore* v. *Taylor*, 508 U. S. 333, 344-345, n. 3 (1993), a plurality of the Court noted, "The existence of such an institutionalized state practice over a period of years is strong evidence of the reasonableness of the interpretations given existing precedents by state courts." This is an important point and one worthy of definitive resolution by this Court. New rules which throw out standard practices are disruptive enough when they apply only to cases on direct review, but when they are applied as well to "final" cases, they are nothing short of disastrous. The present case would be a proper one to establish the principle that any decision disallowing a previously standard practice of long standing is a "new rule," at least presumptively if not *per se*.

B. Teague and AEDPA.

The definition of "new rule" under *Teague* remains important after the enactment of the Antitterrorism and Effective Death Penalty Act of 1996 (AEDPA). As this Court held in its previous decision in the present case, *Teague* remains an independent limitation on federal habeas relief. *Horn* v. *Banks*, 536 U. S. 266, 272 (2002) (*per curiam*). Where the state court addresses the merits on state collateral review, as in the present case, the *Teague* limitation looks to the state of the law at a different date from the 28 U. S. C. § 2254(d)(1) "clearly established" limitation. Where the state court does not address the merits due to procedural default, the latter limitation does not apply, but *Teague* can still be important. See, *e.g.*, *Breard* v. *Greene*, 523 U. S. 371, 376-377 (1998) (*per curiam*).

In any event, the definition of "new rule" remains important because of its inverse relationship with AEDPA's "clearly established" standard. "[W]hatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law . . .' under § 2254(d)(1)." *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000). Having been endorsed and codified by Congress, the distinction between new and old rules is more important than ever.

II. The present case demonstrates that the *Mills*/*McKoy* rule requires clarification.

A. Two Kinds of Unanimity.

Concurring in the judgment in *McKoy* v. *North Carolina*, 494 U. S. 433, 455, n. * (1990), Justice Kennedy sounded a note of caution regarding possible misinterpretation of that opinion.

"Indeed, the broad language of today's opinion might be read to suggest that a scheme requiring jury unanimity as to the presence *or absence* of a mitigating factor could violate the Constitution. Such a requirement, however, enhances the reliability of the jury's decision without any risk that a single holdout juror may impose a sentence against the views of the other 11." (Emphasis in original).

The Court of Appeals' interpretation of *Mills* in its first opinion in this case demonstrates that Justice Kennedy's concern was justified. That court apparently understood the rule of *Mills* to be that jury instructions violate the Constitution if "a reasonable jury could have concluded from the instruction that unanimity was required to find a mitigating circumstance." *Banks* v. *Horn*, 271 F. 3d 527, 546 (CA3 2001). Greater depth of analysis is required. Properly understood, *Mills* does not forbid a bidirectional unanimity requirement.

The problem in *Mills* was the possibility that the jury could have understood its instructions to require it to give no effect whatsoever to any mitigating circumstance on which the jury was divided, and they must proceed to the final decision on the assumption that circumstance was not true. That is not the same as a general prohibition on any unanimity requirement. See *Mills* v. *Maryland*, 486 U. S. 367, 375 (1988). When the jury is not unanimous upon its initial consideration of a mitigating circumstance, there are four possible modes of proceeding:

1. Each juror should proceed to the final decision considering the circumstance if he or she has individually found it true.

2. All jurors should proceed on the premise the circumstance is true.

3. All jurors should proceed on the premise the circumstance is false.

4. The jurors should continue deliberating until they are unanimous, and if they cannot agree report deadlock to the

judge, *i.e.*, exactly the procedure they just finished following for the guilt verdict.

Only number 3 violates the rule of *Mills*. Neither *Mills* nor *McKoy* forbids a state from requiring a jury to continue deliberating until it is unanimous one way or the other. The assumption that *Mills* forbids any kind of unanimity requirement is too simplistic. *Mills* forbids a state from giving a minority of jurors the power to block the others from considering a circumstance they believe is true. The Court of Appeals' analysis completely ignores this distinction.

The instructions in the present case included a sentence not found in the instructions in *Frey* v. *Fulcomer*, 132 F. 3d 916 (CA3 1997): "If, after conscientious and thorough deliberations, you are unable to agree on your findings and your verdict, you should report that to me." *Banks*, 271 F. 3d, at 547. This sentence indicates interpretation 4 above, continue deliberating until unanimous or report deadlock. It flatly contradicts interpretation 3, the *Mills* violation. Yet the Court of Appeals, in apparent reference to this sentence, finds it "even more egregious than in *Frey* regarding the need for the jurors to 'agree' on their 'findings.' " *Id.*, at 547, n. 23.

There is nothing "egregious" or even erroneous about requiring jurors to deliberate until they are unanimous. Such a procedure is entirely in accord with the Anglo-American jury tradition. See *McKoy*, 494 U. S., at 452 (Kennedy, J., concurring in the judgment). That was how the dissent understood the instructions in *Mills*. 486 U. S., at 391-393 (Rehnquist, C.J., dissenting). The *Mills* majority did not dispute that such a procedure would be constitutional; the holding is based entirely on the possibility of a different interpretation. See *id.*, at 378, and n. 11, 383.

The instructions in this case violate the rule of *Mills* only if the possibility of interpretation 3, as distinct from interpretation 4, reaches the "reasonable likelihood" threshold of *Boyde* v. *California*, 494 U. S. 370, 380 (1990). The Court of Appeals

not only failed to appreciate the distinction, it placed an important sentence on the wrong side of the balance. See 271 F. 3d, at 547, and n. 23. Discussing the verdict slip, the Court of Appeals says, "There is also no language anywhere on the form from which the jury could infer that a mitigating circumstance might be marked if only one juror had found that circumstance to exist." *Id.*, at 550. There is also no language anywhere in the Third Circuit's opinion from which we can infer that the court understands that such a procedure is *not* required by *Mills*. That is, the court appears to be completely oblivious to the distinction between the two kinds of unanimity requirements, one valid and one not. This error makes evident the need for further clarification of exactly what *Mills* prohibits and what it allows.

The differences from *Mills* do not stop there. In the present case, there is no need to speculate what the jurors individually found, because the trial judge asked them. The jurors were individually polled on their circumstance findings as well as their final penalty verdict, and every one responded with the same circumstance. *Commonwealth* v. *Banks*, 656 A. 2d 467, 471 (Pa. 1995). The possibility that a "requirement of unanimity" operated to "produce a capital sentence that lacks unanimous support of the jurors," *McKoy*, 494 U. S., at 452 (Kennedy, J., concurring in the judgment), simply is not present in this case. This jury *was* completely unanimous on the mitigating factors. This is not the least bit surprising, since the defense focused on mental illness, its case for that factor was strong, and that is the factor the jury found. See *Commonwealth* v. *Banks*, 521 A. 2d 1, 6-9 (Pa. 1987).

In the wake of *Mills* and *McKoy*, courts and legislatures have adopted the "every juror for himself" approach in the erroneous belief that it is constitutionally required. See, *e.g.*, 18 U. S. C. § 3593(d); Maryland Rule 4-343(h). The result is to subtly undermine the regularity that was the central purpose of the post-*Furman* reforms. In order that those sentenced to death not be a "capriciously selected random handful," *Furman*

v. *Georgia*, 408 U. S. 238, 309-310 (1972) (Stewart, J., concurring), arbitrariness must be restrained in *both* directions. If a circumstance is considered mitigating in one defendant's case and not in the case of another similarly situated defendant, regularity and even-handedness are undermined. The rule of *Lockett* v. *Ohio*, 438 U. S. 586 (1978) and its progeny makes this inevitable to the extent that the definition of "mitigating" can be decided by each jury *as a body*, see *Graham* v. *Collins*, 506 U. S. 461, 494 (1993) (Thomas, J., concurring), but allowing that decision to turn on the idiosyncracies of *individual* jurors greatly aggravates the problem.

This is not idle speculation. Individual jurors have demonstrated some truly bizarre notions of what constitutes mitigation. For example, the case of Steven Oken is a revolting case of sexual assault and murder by a triple rapist/murderer. See *Oken* v. *State*, 790 A. 2d 612, 614-617 (Md. 2002) (Cathell, J., dissenting). Under Maryland's post-*Mills* procedure, at least one juror *actually* found that sexual sadism was a *mitigating* factor! See *Oken* v. *State*, 612 A. 2d 258, 283 (Md. 1992); see also *Graham* v. *Collins*, 506 U. S. 461, 500 (1993) (Thomas, J., concurring) (claim of "mitigating" circumstance "that the defendant suffers from chronic 'antisocial personality disorder'—that is, that he is a sociopath"). We have idiosyncratic jurors weighing as mitigating those factors which anyone with sense would count as grievously aggravating. This is irrational, arbitrary, and contrary to the principles of *Furman*.

Before legislatures and state courts can move capital sentencing law back in the direction of greater regularity and less capriciousness, this Court must make clear that they are permitted to do so. The states have been so badly whipsawed by shifting doctrine that nothing less than a clear holding will do. This case presents an opportunity for that clear holding. The additional sentence in the instruction to report back in the event of deadlock reduces the possibility of interpretation number 3, the *Mills* violation, below the *Boyde* threshold. The jury poll establishes that this jury was, in fact, unanimous on

the factors. The Court can, in this case, establish the footnote in Justice Kennedy's *McKoy* concurrence as unquestioned law.

B. The Boyde Criterion.

There is a second point which should be clear, but evidently is not. The Court of Appeals in this case relied on *Mills* v. *Maryland* for the proposition that "the critical question is . . . whether a reasonable jury *could* have interpreted the instructions in an unconstitutional manner . . . ." 271 F. 3d, at 544 (emphasis added). *Mills* did indeed say that, as the dissenters so vigorously asserted in *Boyde* v. *California*, 494 U. S. 370, 390 (1990) (Marshall, J., dissenting) ("unequivocally confirmed"). However, the *Boyde* majority found the precedents as a whole less clear and adopted the "reasonable likelihood" standard. *Id.*, at 380. *Mills* is simply no longer good law on this point.

The Court of Appeals in this case was oblivious to the distinction between the *Mills* standard and the *Boyde* standard, and it cited them interchangeably as if they were the same. Indeed, in the very same paragraph in which the court cites the discredited *Mills* standard, it also cites *Boyde*. See 271 F. 3d, at 544.

The difference is important. Enormous amounts of time and resources are expended in the microdissection of capital penalty jury instructions. Three decades after *Furman*, we should expect that all defects in standard instructions which are so *fundamental* as to transgress the Constitution have been found, and that further fine-tuning can be safely left to state courts and legislatures. Yet the process continues in cases such as this one, where an instruction considered perfectly proper at the time of the trial is still being litigated *twenty years* later.

The *Boyde* standard, properly understood and fairly applied, would give states more breathing room and allow most constitutional challenges to standard instructions to be quickly dismissed. The instructions in the present case do not create a

reasonable likelihood that the jury thought any number of jurors less than unanimous could preclude the others from considering a circumstance they continued to believe was true. The jury poll affirmatively demonstrates this did not happen. *Boyde* precludes Banks' claim, but apparently the standard is not sufficiently clear.

III. The Court of Appeals flagrantly evaded the governing habeas statute.

Stubborn resistance to the limits on federal habeas by courts of appeals is not confined to disregard of this Court's precedents. Cavalier disregard of the limits established by Congress is also widespread. On May 19 of this year, this Court unanimously reversed a decision of the Sixth Circuit in which that court recited the rule of 28 U. S. C. § 2254(d) and then completely failed to apply it, deciding the case *de novo* instead. *Price* v. *Vincent*, 538 U. S. __ (No. 02-254, May 19, 2003) (slip op., at 4).

The Court of Appeals' first opinion in the present case is no better. It says,

> "the United States Supreme Court has made it clear that a federal court must apply independent judgment in its interpretation of federal law and if, 'after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody . . . violates the Constitution, that independent judgment should prevail.' " *Banks* v. *Horn*, 271 F. 3d 527, 542, n. 15 (CA3 2001) (quoting *Williams* v. *Taylor*, 529 U. S. 362, 389 (2000)).

The Court of Appeals appears to be oblivious to the fact that this passage is not from the opinion of the Court in *Williams*. It is from part II of Justice Stevens' opinion, which is, in effect, a dissent on this point. The opinion of the Court on this point is part II of Justice O'Connor's opinion, which

emphatically rejects this passage. See *Williams*, 529 U. S., at 403. For the Court of Appeals to cite a major precedent of this Court for exactly the opposite of its actual holding is unsettling, to put it mildly.

Regrettably, the Court of Appeals' opinion in the present case does not stand alone in its embrace of the *de facto* judicial repeal of the statute, which this Court rejected in *Williams*. In *Van Tran* v. *Lindsey*, 212 F. 3d 1143, 1153-1154 (CA9 2000), the Ninth Circuit adopted a "firm conviction" standard, despite the fact that this was precisely the standard proposed in Justice Stevens' opinion in *Williams*, 529 U. S., at 389, and rejected by the majority in that case. The Ninth Circuit applied that standard in *Andrade* v. *Attorney General*, 270 F. 3d 743, 753 (CA9 2001), and this Court reversed. "We have held precisely the opposite . . . ." *Lockyer* v. *Andrade*, 538 U. S. __, 155 L. Ed. 2d 144, 158, 123 S. Ct. 1166, 1175 (2003). The present case is equally flagrant.

Such flouting of both an Act of Congress and this Court's precedent by a court of law is intolerable. Beyond question, in this case "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c).

CONCLUSION

The petition for a writ of certiorari should be granted.

June, 2003

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

No. 02-1603

Supreme Court, U.S.
FILED
NOV 14 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JEFFREY A. BEARD, Commissioner, Pennsylvania Department of Corrections; JAMES PRICE, Superintendent of State Correctional Institution at Greene; RAYMOND J. COLLERAN, Superintendent of State Correctional Institution at Waymart; COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

GEORGE E. BANKS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX

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Petition For Certiorari Filed April 14, 2003
Certiorari Granted September 30, 2003

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Writ of Certiorari:

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RELEVANT DOCKET ENTRIES
Luzerne County
Court of Common Pleas

* * *

6-6-83 Upon trial before the Court with a jury, def. pleads not guilty. Whereupon, Court orders issue joined, Jury called and came as follows: #1 Marie Parise – #2 Nancy Kramer Young – #3 Wm. Kaib – #4 Robt. Fleming, Jr. #5 Susan Hoffman – #6 Joseph Fuchs – #7 Thomas Boory – #8 Beatrice Colling – #9 Sheila Steele – #10 Thomas Witherel – #11 Renee Nelson – #12 Mary Nemrig Alternates – Stephanie Brown – Kenneth Dorsey – Mary Broadus – Ralph Koch – Rosie Mitchell – Michael Copeland. Note – Juror #10 excused for medical reasons & replaced by Alternate #1 Stephanie Brown.

6-21-83 After hearing, jury finds def. guilty of all charges as follows: 1519 – 1519A – 1519B – 1519C – 1519D – 1519E – 1519F – 1519G –1506 – 1507 – 1508 – 1290 – Guilty of 1st degree murder, 1520 – Guilty 3rd degree murder. 1519H – Guilty to Attempted Murder-Agg. Assault – Recklessly Endangering. 1524 Guilty to Robbery & Intentionally Putting In Fear of Immediate Serious Bodily Injury – Robbery by Physically Taking or Removing Property by Force – Theft of Motor Vehicle – Recklessly Endangering.

6-22-83 After deliberation, Jury unanimously sentence defendant to death on all 1st degree murder charges. Def. advised of his right to file motions for new trial and/or arrest of judgment w/i 10 days, Def. remanded to Luzerne County Prison. Toole, J.

7-1-83 Motion for New Trial and or In Arrest of Judgment & Order filed. Toole, J.

* * *

11-22-85 Court sentences def. as follows – 1290 – 1st Degree murder = 1506-1519-1507-1508-1519A-1519B-1519C-1519D-1519E-1519F-1519G-2st degree murder def. is to be put to Death in a manner provided by law. Def. advised of his right to appeal to Supreme Court. On 1520=3rd degree murder serve min. 10 yrs. & max. 20 yrs. to run consecutive to death sentence. On 1519H 1st ct. Att. murder-servs min. 5 yrs. & max. 10 yrs. to run consecutive to 1520/82. On 1519H-2nd ct. Agg. Assault & 3rd ct. Recklessly Endg. merg for sentencing with 1st count. On 1524-1st ct Robbery – serve min. 10 yr. and max. 20 yrs. to run consecutive to 1st ct 1519H/82. On 1524 – 2nd ct Robbery – 3rd ct Theft – 4th ct Recklessly Endg. merge for sentencing with the 1st count. On 1519H-1520-1524/82 def. advised of right to appeal in 30 days. Right to modify 10 days. Def. remanded until sentence is executed

* * *

12-13-85 Notice of Appeal to Supreme Court on #1519H-1520-1524/82.

* * *

2/10/87 (Returned from Supreme Court). Judgement from Sentence Affirmed. (2/13/87) Includes Case Nos. 1519-H; 1520 and 1524; 1290; 1506-1519 A, B, C, D, E, F, & G/1982.

2/14/89 Petition Under Post Conviction Hearing Act filed. (3)

3/29/89 Commonwealth's Response to Defendant's Petition under the Post Conviction Hearing Act filed.

* * *

05/26/89 Supplemental Reasons in Support of PCHA Petition and Order filed. s/Toole, J. (all nos.)

* * *

10/07/91 Second Set of Supplemental Reasons in Support of PCHA Petition filed.

* * *

12/23/92 CHARGE: CRIMINAL HOMICIDE-MULTIPLE COUNTS.; APPEAL HEARING: The matter is submitted to the court on briefs. The court will take the matter under advisement s/ Toole, P.J. (NOS. 1290 et'al of 1982)

9/08/93 Opinion and Order filed. s/ Toole, P.J. PCHA IS DENIED. (NOS. 1290, 1506, 1507, 1508, 1519, 1520, & 1524 of 1982)

9/15/93 Notice of appeal filed. (Nos. 1290 et'al/82)

* * *

U.S. District Court
Middle District of Pennsylvania (Williamsport)
CIVIL DOCKET FOR CASE #: 4:96-cv-00294-JFM

* * *

Filing Date	#	Docket Text
02/21/1996	1	MOTION by petitioner George E. Banks to proceed IFP, for stay of Execution and for appt. of Fed. Habeas Corpus Counsel (bs) (Entered: 02/21/1996)

* * *

02/22/1996	4	ORDER by Judge James F. McClure Jr. – 1. granting motion to proceed IFP, subject to Banks filing completed affidavit showing entitlement (a) Clk to provide Banks w/copy of form used for applic. to proceed ifp (b) Banks to file same within 2 wks of its receipt from Clk. 2. Banks motion for appt of counsel granted. 3. Al Flora, Jr., Esq., and William Ruzzo, Esq., appt to represent Banks in these proceedings. 4. Banks motion for stay of execution GRANTED and execution sched for wk of 3/3/96 stayed. 5. C of PA and any official or employee thereof, shall NOT carry out any sentence of death as imposed by Ct of Common Pleas, Luzerne Cty on 6/22/83, in Case Nos. 1290, 1506, 1507, 1508, 1519 A-H, and 1524 of 1982, pending further order of this Ct. 6. Banks to file petition for writ of h.c. pursuant to 28:2254 on or before 3/22/96. 7. Banks to file brief in support of petition on or before 4/12/96. 8. Ct will direct any further briefing and/or response by Commonwealth parties after initial review pursuant to Rule 4 of Rules Governing Section 2254 Cases, 28 USC following 2254. Notice of compliance Pet. H.C. 3/22/96 for George E. Banks (cc: all counsel, Court of Appeals, Depy. Genl. Counsel Syndi Guido, Ofc of Governor of PA, supt. SCI-Rockview,

Supt. SCI Greene, Chief Judge Rambo, M.D.PA. FAXED to Marcy Waldron Ct of Appeals, Syndi Guido, Ofc of Governor PA, Supt SCI-Rockview, D. Pilletz, 1st Asst D.A., Luzerne Cty, Chief Judge Rambo M.D.PA, Supt. SCI-Greene, Counsel for Pet. Banks, Clerk of Court-Scranton, Kevin Calpin Clk. Ofc. Scranton) (bp) (Entered: 02/23/1996)

* * *

03/21/1996	8	PETITION FOR WRIT OF HABEAS CORPUS by a Person in State Custody filed on behalf of Plf George E. Banks, w/attached exhibits (bp) (Entered: 03/21/1996)

* * *

04/29/1996	20	ORDER by Judge James F. McClure Jr. denying motion to remand for State Court proceedings and to hold Federal Habeas Corpus proceedings in abeyance [9-1] (cc: all counsel, Judge Rambo, Court of Aappeals [sic], Clerk-SCSRN, Kevin Calpin, Supt Mazurkiewicz, Gov. Ofc,.) (bp) (Entered: 04/29/1996)

U.S. District Court
Middle District of Pennsylvania (Williamsport)
CIVIL DOCKET FOR CASE#: 4:99-cv-00438-JFM

* * *

Filing Date	#	Docket Text
03/22/1999	1	PETITION FOR WRIT OF HABEAS CORPUS – filed on behalf of petitioner George E. Banks; with attached exhibits. (ts) (Entered: 03/23/1999)

* * *

Filing Date	#	Docket Text
05-07-1999	11	MEMORANDUM AND ORDER by Judge James F. McClure Jr. – Petition by Petitioner Banks for writ of habeas corpus pursuant to 28:12254 dismissed in part pursuant to Rule 4 of Ruls Governing Section 2254 Proceedings in U.S. District courts, 28 USC following 2254. Grounds 7, 9, 11 and 12 of petition dismissed. Answer ddl 5/24/99 for Martin Horn, for Commonwealth of Penn, for Raymond Colleran, for James E. Price Petitioner directed to filed by 6/1/99 brsup of petition. Respondents to file bropp by 6/21/99. Petitioner may file rlybr in supply of petition by 7/5/99. Parties reminde4d [sic] that briefs are to be in conformance w/Local Rule 5.1-5.3, 7.5-7.8 inclusive. Record of state court proceedings having been furnished to this court, parties are relieved of any obligation to provide same (cc: all counsel, C/A3, w/update sheet, Supt. Price, Supt. Mazurkiewicz, Petitioner Banks, Atty Genl of f PA, Guido of Gov. Ofc. Commissioner Horn, Supt. Colleran, Clerk of Court, Operations Mgr, Chif Judge Rambo) (bp) (Entered: 05/07/1999)

* * *

08/18/1999	25	MEMORANDUM AND ORDER by Judge James F. McClure Jr. denying Petitioner's motion for leave to file amended petition [23-1] denying habeas corpus petition [1-1]. We certify pursuant oi 28:2253(e); FRAP 22(b), that Banks has made a substantial showing of the denial of a constitutional right, specifically on the issue of whether the Third Circuit's opinion in Frey v. Fulcomer, 132 F. 3d 916 (3d Cir. 1997), cert. denied, 118 S. Ct. 2076 (1998), controls our consideration of Banks' petition and therefore requires issuance of the writ of habeas corpus. The Stay of execution issued by this court shall remain in effect pending further order of court. Case terminated (cc: all counsel) (bp) (Entered: 08/18/1999)

* * *

09/24/1999	29	Notice of appeal by petitioner George E. Banks from District Court order filed 9/16/1999 [28-1] (Filing fee not paid, TPO mailed to attorney, certified copies, notice of appeal, order being appealed, with info/ack letter to USCA (cc: cnsl, Ct.) (lg) (Entered: 09/24/1999)

* * *

04/21/2003 37 JUDGMENT of USCA (certified copy) as to [29] Notice of Appeal filed by George E. Banks, dated 4/21/03 and issued in lieu of a formal mandate. ORDERED AND ADJUDGED that Banks's sentence, as set forth in the Order of the District Court enter on 9/16/99, be and the same is hereby vacated and the case is remanded with directions to grant a provisional writ of habeas corpus directing resentencing, all of the above in accordance with the opinion of this court. (bp) (Entered: 05/19/2003)

* * *

US Court of Appeals for the Third Circuit

* * *

96-9003 Banks v. Horn, et al

10/7/96 DEATH PENALTY CASE DOCKETED. Notice filed by George E. Banks. ☐ (mmb)

* * *

10/7/96 ORDER appointing office of Public Defender of Luzerne County as CJA counsel to represent Appellant, filed. (mmb)

* * *

10/21/96 APPEARANCE from Attorneys Peter P. Olszewski & Scott C. Gartley on behalf of Appellees, filed. (mmb)

10/21/96 APPEARANCE from Attorneys Al Flora & William Ruzzo on behalf of Appellant George E. Banks #AY-6066, filed. (mmb)

* * *

11/29/96 MOTION filed by Appellant to hold appellate proceedings in abeyance pending the PA State Courts' disposition of a Petition for State Post Conviction Relief ZZ and to hold briefing schedule until thirty ZZ# (30) days after and Unfavorable Order is entered on this motion. Answer due 12/9/96. Certificate of Service dated 11/27/96. (awi)

12/4/96 Clerk's letter to counsel advising the deadline for appellant's brief & appendix has been extended pending disposition of the pending motion for stay of appellate proceedings. In the event the Court denies the motion for stay, appellant's brief and appendix shall be filed and served within ten days from the date of the Court's order denying appellant's motion for stay. (mmb)

12/11/96 RESPONSE by Appellees in Opposition to motion to hold appellate proceedings in abeyance, received. Certificate of service dated 12/9/96. (awi)

12/18/96 ORDER (Sloviter, Chief Judge, Authoring Judge, Greenberg and McKee, Circuit Judges) denying motion by appellant to hold appellate proceedings in abeyance. Appellant shall file his brief within 30 days of the date of this order. The remaining briefs are due pursuant to the court's applicable rules, filed. (ddw)

1/17/97 BRIEF/APPENDIX on behalf of Appellant George E. Banks #AY-6066, Pages; 34, Copies:

10, Delivered by hand, filed. Certificate of Service Date 1/17/97. (bmh)

2/18/97 BRIEF on behalf of Appellees Martin Horn, James Price, Joseph Mazurkiewicz, Comm of PA, Pages; 33, Copies: 10, Delivered by mail, filed. Certificate of Service date 2/18/97. (bmh)

3/4/97 REPLY BRIEF on behalf of Appellant George E. Banks #AY-6066, Copies: 10, Delivered by mail, filed. Certificate of service date 3/4/97. (bmh)

* * *

8/12/97 ARGUED 8/12/97 Panel: Sloviter, Chief Judge, Greenberg, and McKee, Circuit Judge. (rr)

* * *

9/19/97 PUBLISHED OPINION (Sloviter, Chief Judge, Greenberg, Authoring Judge, McKee, Circuit Judges), filed. (ctc)

9/19/97 JUDGMENT, vacated and the cause remanded to the said District Court for dismissal of the petition without prejudice as mixed. All of the above in accordance with the opinion of this Court, filed. (ctc)

10/14/97 MANDATE ISSUED, filed. (lkj)

* * *

US Court of Appeals for the Third Circuit

* * *

99-9005 Banks v. Horn, et al

9/28/99 CIVIL CASE DOCKETED. Notice filed by George E. Banks. (clc)

9/28/99 ORDER appointing CJA counsel, Albert Flora, Jr., Esq. to represent Appellant, filed. (clc)

9/28/99 ORDER appointing CJA counsel, William Ruzzo, Esq. to represent Appellant, filed. (clc)

* * *

10/4/99 MOTION by Appellant for certificate of appealability which may be construed as a motion to Expand the Certificate of Appealability, filed. Answer due 10/14/99. Certificate of Service dated 10/1/99. (clc)

10/12/99 APPEARANCE from Attorney Scott C. Gartley on behalf of Appellee Comm of PA, filed. (clc)

* * *

10/12/99 MEMORANDUM OF LAW IN SUPPORT of motion for certificate of appealability which shall be construed as a Memorandum in Support of Expanding the Certificate of Appealability on behalf of Appellant George E. Banks, filed. Certificate of service date 10/8/99. (clc)

* * *

11/9/99 RESPONSE filed by Appellee Comm of PA to motion to expand certificate of appealability. Certificate of service dated 11/8/99. (clc)

6/27/00 ORDER (Sloviter, Authoring Judge, Roth, Rendell, Circuit Judges) granting motion for certificate of appealability pursuant to 28 U.S.C. section 2253(c)(2) and L.A.R. 22.1 limited to issue (1), whether Petitioner effected a knowing intelligent, and voluntary waiver of his Sixth Amendment right to assistance of counsel. In all other respects, Petitioner's Application for Certificate of Appealability is ZZ#DENIED. The Clerk to set the briefing schedule, filed. (clc)

* * *

8/7/00 BRIEF on behalf of Appellant George E. Banks #AY-6066, Pages: 27, Copies: 10, Delivered by mail, filed. Certificate of service date 8/7/00. (mow)

* * *

9/11/00 BRIEF on behalf of Appellee Comm of PA, With Certificate of Compliance pursuant to F.R.A.P. 32(a)(7)(B)(i). Pages: 36, Copies: 10, Delivered by mail, filed. Certificate of Service date 9/11/00. (lal)

* * *

9/26/00 MOTION by Appellant titled Motion for Leave to Discontinue Appeal which the court may wish to construe as a motion to extend time to file reply brief, filed. Answer due 10/10/00. Certificate of Service dated 9/26/00. (clc)

9/29/00 ORDER (Sloviter, Authoring Judge, Roth, Rendell, Circuit Judges) granting motion to extend time to file reply brief which is unopposed. The Clerk shall fix the date when the reply brief will be issued, filed. (clc)

* * *

10/5/00 ORDER (Clerk) directing the Prothonotary of the Court of Common Pleas, Luzerne County to forward the state court record in ZZ_Commonwealth ZZ_v. ZZ_Banks to the Clerk of this Court, filed. (mgd)

* * *

10/6/00 REPLY BRIEF on behalf of Appellant George E. Banks #AY-6066, Copies: 10, Delivered by mail, filed. Certificate of service date 10/6/00. (dhd)

* * *

10/12/00 MOTION by Proposed Amicus-Appellant PA Assn Crim Def and, Louis M. Natali for leave to proceed as amicus curiae, to file brief out of time and for enlargement of page limitation for brief to 56 Pages, filed. Answer due 10/25/00. Certificate of Service dated 10/12/00. (lal)

1/12/01 ORDER (Sloviter, Authoring Judge, Roth and Rendell, Circuit Judges) granting motion by PA Assn Crim Def and Louis M. Natali for leave to proceed as amicus curiae in support of Appellants, to file brief out of time and for enlargement of page limitation to 56 pages with filing as of the date of this order, filed. (lal)

1/12/01 AMICUS BRIEF on behalf of PA Assn Crim Def and Louis M. Natali in support of Appellants. Pages: 56, Delivered by mail, filed. Certificate of service date 10/12/00. (lal)

1/17/01 APPEARANCE from Attorney Peter Goldberger on behalf of Amicus-appellant PA Assn Crim Def, filed. (clc)

* * *

2/5/01 APPEARANCE from Attorney Louis M. Natali on behalf of Amicus-appellant PA Assn Crim Def and Louis M. Natali, filed. (clc)

2/16/01 CLERK'S LETTER to counsel written at the direction of the Court advising counsel that the Court has noted that the Supreme Court has granted certiorari in the ZZ_Duncan ZZ_v. ZZ_Walker, No. 00-121, on the question of "Does prior federal habeas corpus petition qualify as "application for State post-conviction or other collateral review within meaning of 28 U.S.C. Section 2244(d) . . . The Court would like counsel's view as to whether it should hold in abeyance further proceedings

in this matter pending the Supreme Court's decision in the ZZ_Duncan case. Counsel is requested to file an original and three copies of contemporaneous letters reponding to this question. (See letter for specifics.) Response due by 3/5/01. (clr)

3/5/01 ANSWER received dated March 1, 2001, from Al Flora, Jr., Esq. and William Ruzzo, Esq., counsel for Appellant, in accordance with the Court's request of February 21, 2001 requesting counsel's view as to whether it should hold this case in abeyance, filed. (mac)

3/6/01 ANSWER dated March 5, 2001, received from Scott C. Gartley, Esq., Counsel for Appellee, in accordance with the Court's request of February 16, 2001, requesting counsel to address whether this matter should be held in abeyance, from Appellee Comm of PA, filed. (clr)

3/7/01 CLERK'S LETTER to counsel written at the direction of the Court advising counsel that Court will proceed with argument in the above case as scheduled for April 2, 2001, at 3:00 p.m. (clr)

* * *

3/26/01 CLERK'S LETTER to counsel written at the direction of the Court, the government is instructed to be prepared at oral argument to address the issue of the timeliness of the second habeas petition, including why the government's failure to cross-appeal is not a waiver. If the parties wish, they may submit letter memoranda on this issue, these shall be filed in the Clerk's Office not later than noon on Thursday, March 29, 2001. Response due by 3/29/01. (mac)

* * *

3/28/01 ANSWER dated March 28, 2001, received via facsimile from Scott C. Gartley, Esq., counsel for Appellee, addressing the issue of the "timeliness of the second habeas petition, including why the government's failure to cross-appeal is not received in accordance with the court's request from Appellee Comm of PA, filed. (clr)

3/29/01 ANSWER dated March 28, 2001, received from Al Flora, Jr., Esq., counsel for Appellant, addressing the issue of the "timeliness of the seconf habeas petition, including why the government's failure to cross-appeal is not a waiver, in accordance with the Court's request of March 26, 2001, from Appellant George E. Banks #AY-6066, filed. (clr)

* * *

4/2/01 ARGUED Monday, April 2, 2001 Panel: Sloviter, Roth and Rendell, Circuit Judges. Counsel is directed to file 4 copies of the verdict slip. (Should be given to Patricia Coleman for processing.) (mac)

4/2/01 COURT RESPONSE REQUEST AT ORAL ARGUMENT to Appellant to provide 4 copies of verdict slip (give to Patricia Coleman for processing.) Response due by 4/9/01. (mac)

4/9/01 ANSWER received in accordance with the Court's request at Oral Argument from Appellant George E. Banks, filed. (nmb)

10/31/01 PUBLISHED OPINION (Sloviter, Roth, Rendell, Authoring Judge and Circuit Judges), filed. (clc)

10/31/01 JUDGMENT vacated and the case is remanded for resentencing, filed. (clc)

11/14/01 PETITION by Appellee for rehearing en banc, filed. Certificate of service dated 11/14/01. (clc)

11/14/01 Brief of Amicus Curiae in Support of Appellee Petition for Rehearing En Banc, filed. (clc)

* * *

12/11/01 ORDER (Chief Judge Becker, Mansmann, Scirica, Nygaard, Alito, Roth, McKee, Rendell, Authoring Judge, Barry, Ambro and Fuentes, Circuit Judges) denying petition for in banc rehearing by Appellee, filed. Chief Judge Becker would have granted rehearing. (clc)

* * *

12/18/01 MOTION by Appellee to stay mandate pending the filing of a petition for a writ of certiorari, filed. Answer due 1/2/01. Certificate of Service dated 12/18/01. (clc)

* * *

1/29/02 ORDER AMENDING PUBLISHED OPINION (Sloviter, Roth, Rendell, Authoring Judge and Circuit Judges), filed. (clc)

1/30/02 ORDER (Sloviter, Roth and Rendell, Authoring Judge, Circuit Judges) granting motion to stay mandate by Appellee Comm of PA until 3/11/02, filed. (mgd)

* * *

3/14/02 Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellant George E. Banks. Filed in the Supreme Court on 3/4/02 at Supreme Ct. case number: 01-8875. (clc)

3/14/02 Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellee

Comm of PA. Filed in the Supreme Court on 3/11/02 at Supreme Ct. case number: 01-1385. (clc)

5/31/02 U.S. Supreme Court order dated 5/28/02 at S.C. number: 01-8875, denying petition for writ of certiorari by Appellant George E. Banks, filed. (clc)

6/17/02 U.S. Supreme Court opinion on behalf of Martin Horn, et al, filed (Opinion filed in the S.C. on 6/17/02). (clc)

6/17/02 CALENDARED for Monday, June 17, 2002. (clr)

* * *

7/22/02 SUPREME COURT ORDER filed 6/17/02 vacating the judgment and remanding the cause to this Court for further consideration. (sma)

7/26/02 U.S. Supreme Court letter filed advising this court that a petition for rehearing in the above-entitled case was timely filed on July 12, 2002, and was received in the office on July 18, 2002. The judgement of the Supreme Court issued on July 17, 2002 is recalled, filed. (clc)

8/8/02 U.S. Supreme Court order dated 8/5/02 at S.C. number: 01-8875, denying petition for rehearing, filed. (mgd)

9/18/02 CLERK'S LETTER to counsel written at the direction of the Court advising counsel that in light of the Supreme Court's remand order requiring the panel to engage in an analysis under ZZ_TeagueZZ_ regarding the retroactive application of ZZ_MillsZZ_ in this matter, the Court will permit counsel to file supplemental briefing on this issue, if they wish to do so, focusing on this issue. (See letter for specifics.) The Court will consider the existing briefing in ZZ_TeagueZZ_ and seeks only such additional

argument or case law that would like the Court to consider. The Commonwealth should submit its brief within 20 days of the date of this letter, and Banks shall file his brief within 10 days thereafter. The briefs shall not exceed words each. Response due by Commonwealth on 10/8/02 and Banks on 10/18/02. (clr)

10/8/02 ANSWER/Appellees' Memorandum of Law Regarding the Retroactive Application of ZZ_MillsZZ_ ZZ_v.ZZ_ ZZ_ ZZ_MarylandZZ_, dated October 8, 2002, received from Scott C. Gartley, Esq. counsel for Appellee, in direct response to the Court's request of September 18, 2002, filed. (clr)

10/18/02 ANSWER/Appellant's Supplemental Brief, dated October 17, 2002, received from Albert J. Flora, Jr., Esq., counsel for Appellant, in direct response to the Court's request at oral argument, filed. (clr)

1/6/03 MOTION by Amicus-appellants PA Assn Crim Def and Louis M. Natali for leave to file amicus curiae supplemental brief, filed. Answer due 1/20/03. Certificate of Service dated 1/6/03. (mcw)

1/14/03 ORDER (Sloviter, Authoring Judge, Roth and Rendell, Circuit Judges) denying motion to file supplemental brief by Amicus-appellant PA Assn Crim Def as untimely, filed. (clc)

1/14/03 PUBLISHED PRECEDENTIAL REPORTED OPINION (Sloviter, Roth and Rendell, Authoring Judge, Circuit Judges), with separate concurring opinion by Judge Sloviter, filed. (clc)

1/14/03 JUDGMENT vacated and the case is remanded with directions to grant provisional

writ of habeas corpus directing resentencing, filed. (clc)

2/4/03 MOTION by Appellee to stay mandate pending the Filing of a Petition for a Writ of Certiorari, filed. Answer due 2/17/03. Certificate of Service dated 2/3/03. (clc)

2/5/03 ORDER (Sloviter, Authoring Judge and Roth, Circuit Judges) granting motion to stay mandate by Appellee Comm of PA. Mandate Stayed to 3/6/03, filed. (clc)

3/7/03 MOTION by Appellee for extension of the stay of the mandate filed. Answer due 3/20/03. Certificate of Service dated 3/7/03. (clc)

3/11/03 ORDER (Sloviter, Authoring Judge, Roth and Rendell, Circuit Judges) granting motion to stay mandate by Appellee, filed. (clc)

4/21/03 MANDATE ISSUED, filed. (clc)

5/12/03 Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellee Comm of PA. Filed in the Supreme Court on 5/7/03 at Supreme Ct. case number: 02-1603. (mgd)

* * *

6/5/03 ORDER (Clerk) recalling certified judgment issued in lieu of a formal mandate, filed. (ghb)

* * *

10/20/03 U.S. Supreme Court order dated 9/30/03, at S.C. number: 02-1603, granting petition for writ of certiorari by Appellee Comm of PA, filed. (mgd)

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY –
vs.	:	
GEORGE E. BANKS,	:	
Defendant	:	CRIMINAL NOS. 1290, 1506, 1507, 1508, 1519, 1520, 1524 of 1982

STENOGRAPHER'S RECORD (VOLUME VI)

of trial in the above-captioned matters before Hon. Patrick J. Toole, Jr., A.L.J., and a Jury, in Courtroom #4, Luzerne County Court House, Wilkes-Barre, Pennsylvania, commencing on Monday, June 6, 1983. (Sessions June 20, 21, 22, 1983).

APPEARANCES:

ROBERT J. GILLESPIE, JR., ESQ.,
District Attorney;
LAWRENCE M. KLEMOW, ESQ.,
Assistant District Attorney;
MICHAEL D. BART, ESQ.,
Assistant District Attorney,
for the Commonwealth;

BASIL G. RUSSIN, ESQ.,
Public Defender;
JOSEPH F. SKLAROSKY, ESQ.,
First Assistant Public Defender;
ALBERT J. FLORA, JR., ESQ.,
Assistant Public Defender,
for Defendant.

* * *

[2,315] THE COURT: Members of the jury, you must now decide whether the defendant in this case is to be sentenced to death or to life imprisonment on each of

the Informations upon which you have returned a verdict of guilty of murder in the first degree.

The sentence you imposed will depend upon your findings concerning aggravating and mitigating circumstances. The Crime Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances.

The verdict must be a sentence of life imprisonment in all other cases.

[2,316] The Crime Code defines aggravating and mitigating circumstances. For the purposes of this hearing, only the following matters, if established beyond a reasonable doubt, can constitute an aggravating circumstance. As I indicated to you, there will be three submitted for your consideration.

The first is that the defendant, in the commission of the offense, knowingly created a grave risk of death to another person in addition to the victim. You must ask yourselves: Did this defendant, at the time he committed the act in question, knowingly create a grave risk of death to another person? Did he or should he have reasonably foreseen a risk to neighbors or someone else? Did he contemplate and did he, in fact, cause such a risk?

In order to find that aggravating circumstance present, you must be satisfied that it exists beyond a

reasonable doubt. If you are not so satisfied, then it is not and you cannot consider it an aggravating circumstance.

The second submitted to you reads: "The defendant has a significant history of felony convictions involving the use or threat of violence to the person." In this regard, you have been informed, through the stipulation, that this defendant, approximately twenty years ago, was convicted of the offenses of attempted armed robbery and felonious assault with intent to kill. These two criminal [2,317] convictions arose out of one incident, for which the defendant received terms of imprisonment which were directed to be served concurrently. That means together.

You have also been told that the Governor of the Commonwealth of Pennsylvania, at a later date, commuted that sentence.

You must decide whether or not those convictions arising out of that incident constitute a significant history of felony convictions. If you are satisfied beyond a reasonable doubt that it does, then you may consider that an aggravating circumstance. If you are not satisfied beyond a reasonable doubt that these constitute a significant history, then you should not consider or find it as an aggravating circumstance.

The third submitted is that the defendant has been convicted of another federal or state offense committed either before or at the time of the offense at issue for which a sentence of life imprisonment or death was imposable, or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense. There is no question, in this case, that this defendant was not, at the time, undergoing a

sentence of life imprisonment for any reason, so your determination must be only as to the first part.

You must decide whether or not the other eleven [2,318] killings which you found to be first degree and for which a penalty of death could be imposed constitutes an aggravating circumstance. You may consider it as such only if you are satisfied beyond a reasonable doubt that it is such a circumstance.

For the purposes of this case, the following matters, if proven by a preponderance of the evidence, constitute mitigating circumstances. And once again, you will recall, three have been submitted for your consideration.

The first is that the defendant was under the influence of extreme mental or emotional disturbance. And at this point, I have to stop and tell you that the law to be applied at this stage of the proceeding is not the same as the test offered to you in determining sanity in the guilt part of this trial.

You will recall, in the last part of the trial, you were told that our interest in the insanity case is as to the defendant's cognitive abilities, his intellectual abilities, and you were specifically advised that emotional instability did not constitute insanity. I will instruct you that at this stage of the proceeding, we are not dealing with insanity. We are, in fact, at this point, now interested in the volitional, as well as the emotional, difficulties of the defendant, and you may consider them, if you find them to exist by a preponderance of the evidence, to [2,319] the extent that he was under the influence of extreme mental or emotional disturbance. Do you find, from the evidence, the existence, first, of a mental disturbance or an emotional disturbance? If you do, you must then determine

whether it is severe or not. If it is, you may, if you are satisfied by a preponderance of the evidence that it exists, consider that a mitigating circumstance.

The second mitigating circumstance offered to you is that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. I want to go back again to the instructions I gave you at the close of the guilt-or-innocence portion of the case. And at that time, I told you this:

Under the Pennsylvania test for insanity, a defendant either understands the nature and quality of his acts or he does not. He is either able to distinguish between right and wrong or he is not. The test in Pennsylvania, unlike in Maryland, where they absolve a defendant who lacks substantial capacity, is not the test in Pennsylvania.

I want you to know that at this part of this proceeding, Pennsylvania does employ the same test that Maryland does. The issue is not whether he understood or knew the nature or quality of his act, or whether he was able to distinguish between right and wrong. The issue is [2,320] now: Did he have the capacity to appreciate? And I suggest to you that "appreciate" has a much different meaning. "Appreciate" means to judge or evaluate the worth, the merit, the quality or significance of; to comprehend with knowledge, judgment and discrimination; to judge with heightened perception or understanding; to be fully sensible of. Was this defendant aware of the criminality of his conduct? Did he appreciate the criminality of his conduct?

And also, you will recall I said to you to be legally insane, the defendant must be completely or totally

unable. And I told you that we don't have degrees of incapacity when it comes to insanity. But when it comes to sentencing, you will notice that the test is: Was his ability to appreciate, his capacity to appreciate, was his conduct able to conform to the requirements of the law? And we want to know, was either his capacity or ability impaired? The test is, was it impaired? Was it substantially impaired? If it was, and you find that from a preponderance of the evidence, you may consider that a mitigating circumstance.

And the final mitigating circumstance submitted to you is whether there is any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense. And you have heard the arguments of counsel. You have heard the evidence. And you will make that determination on the basis of all the evidence you have [2,321] heard and the arguments of counsel.

Once again, the Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. The defendant has the burden of proving mitigating circumstances by a preponderance of the evidence. The preponderance of the evidence is a lesser burden of proof than beyond a reasonable doubt. A preponderance of the evidence exists where one side is more believable than the other or, as has been explained to you, a preponderance exists whenever the scales tip ever so slightly. That's a preponderance.

All the evidence from both sides that was submitted to you during the course of this trial shall be considered by you. All the evidence from both sides, including the evidence you heard earlier as to aggravating or mitigating

circumstances, is important and proper for you to consider. You should not decide, as you have been told, out of any feelings of vengeance or prejudice toward the defendant. You must decide this case on the basis of the evidence presented and the arguments offered to you.

The verdict, ladies and gentlemen, is for you. Remember and consider all the evidence, giving it the weight to which it is entitled. Remember that you are not merely recommending a punishment. The verdict you return will actually fix the punishment at death or life imprisonment on each Information. Remember, again, your verdict in [2,322] each case must be unanimous. It cannot be reached by a majority vote or by any percentage. It must be the verdict of each and every one of you.

Remember, under the law of this Commonwealth, your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstance, or if you unanimously find one or more aggravating circumstances which then outweigh any mitigating circumstances.

In all other cases, your verdict would be life imprisonment.

You're going to be given a verdict slip. There are twelve of them. Again, I think they are self-explanatory, but I want you to know this additional thing:

A mitigating circumstance, if found to exist, need not outweigh an aggravating circumstance in order to find in favor of life imprisonment. If, after you consider all the evidence and the arguments of counsel, you place the aggravating circumstances you find, if any, on the scale of justice and you weigh them, if, after you do that, the scales

are still balanced, then your sentence must be life imprisonment. If the scales tip in favor of the mitigating circumstances, your verdict must be life imprisonment. And if you find the existence of one or more aggravating [2,323] circumstance and one or more mitigating circumstance, and you weigh them, you can only return death if it weighs in favor of the aggravating.

That, ladies and gentlemen, is this case. If, after conscientious and thorough deliberations, you are unable to agree on your findings and your verdict, you should report that to me. If, in my opinion, further deliberations will not result in a unanimous agreement on the sentence, then I will tell you it will become then my duty to impose a sentence of life imprisonment on each Information.

The verdict slips, one copy of which you will be given, read, as follows, and I'll go over it. It starts out by saying, "We, the jury, unanimously sentence the defendant in the above-entitled matter to," and then there are only two possible sentences: death and life imprisonment. You will check the appropriate one.

If your sentence is death, then you are required to complete the rest of the verdict form.

The second question indicates to be completed if the sentence is death, and then it reads: "We, the jury, have found unanimously," and then it says, "at least one aggravating circumstance and no mitigating circumstance." And then, if you have done that, you will check the first. And then it tells you you must note which aggravating circumstance, if any, you found, or circumstances, if any, you found.

[2,324] If you find, again, no aggravating circumstances, then the verdict is life imprisonment. If you find at least one aggravating circumstance and at least one mitigating circumstance, then you are required by law to weigh them. And the only way you can then return a verdict of death is if you conclude that the aggravating circumstance outweighs the mitigating. And that is the second part, where it indicates one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances. And if that's the part of the verdict you employ, you will make the appropriate check marks.

I have also listed, with the agreement of counsel, the three aggravating circumstances being submitted for your consideration, as well as the three mitigating circumstances being submitted to you for your consideration.

That's the law as it applies to this case, to this part of the proceeding. Once again, I remind you that your duties are important; they are serious. There is no more awesome responsibility, no more awesome duty imposed on anyone in this world than that which is now placed in your hands.

Anything further, gentlemen?

MR. GILLESPIE: Nothing further, Your Honor.

MR. SKLAROSKY: Just one item. May we approach side bar, Your Honor.

THE COURT: Certainly.

[2,325] [The following transpires at side bar, out of hearing of the jury:

MR. SKLAROSKY: In the Court's Charge, whereby the Court goes on to say, "Remember that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstances, or if you unanimously find one or more aggravating circumstances – " and then the Court inserted the word "then" – "outweigh any mitigating circumstances," I submit that by the insertion of the word "then," it presumes that the aggravating circumstance will outweigh the mitigating circumstance.

THE COURT: Use of the word "then," okay. Obviously, I don't recall it, but I will try to clear it up.]

[Court resumes Charge.]

THE COURT: Counsel has indicated that in the course of my remarks to you, I may have made some statement that may be confusing. I hope not. But, hopefully, to avoid any confusion, let me see if I can do it a different way.

I have told you there are three aggravating – statutorily-defined aggravating circumstances being submitted for your consideration, along with three statutorily-defined mitigating circumstances for your consideration.

You must decide, on the basis of the evidence as you have heard it whether those circumstances do, in fact, exist. In order to find that an aggravating circumstance [2,326] exists, you must be satisfied that it has been established by the Commonwealth beyond a reasonable doubt.

In order to find a mitigating circumstance, you must be satisfied that it has been established not beyond a

reasonable doubt, but simply, by a preponderance of the evidence.

After you have considered all of the evidence, you will then ask yourselves: Did the Commonwealth prove any aggravating circumstances – any one of the three or two or all or none? If there are not aggravating circumstances found by you to exist, your verdict must be life imprisonment. If you find beyond a reasonable doubt the existence of any one or more aggravating circumstance, then you must determine whether there existed in this case any mitigating circumstance.

If you find, by a preponderance of the evidence, that there is one or more mitigating circumstances and you have found that there is one or more aggravating circumstances, then you must weigh them, and the only way you can return a death verdict is if, when you weigh them, the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances that you have found.

Again, if when you place them on the scale, the scale does not tip in favor of aggravating, your verdict must be life. If when you place them on the scale, the [2,327] scale, is still equally balanced, your verdict must be life. The only way the penalty must be death is if, when you weigh them, the scales tip in favor of the aggravating circumstances.

Is that clear, gentlemen?

MR. SKLAROSKY: Thank you, Your Honor.

MR. GILLESPIE: Your Honor, may counsel approach the bench?

THE COURT: Certainly.

[Sidebar discussion follows, off record.]

THE COURT: I indicated that the only way you could return death is if the scales outweighed in favor of aggravating. That, obviously, the weighing only occurs if you find the existence of one or more aggravating and one or more mitigating. That's the only time you weigh. If you find the existence of an aggravating and no mitigating, then there is no weighing. The penalty is death.

Does that clear it up, gentlemen?

MR. GILLESPIE: Thank you, Your Honor.

* * *

[2,332] MR. SKLAROSKY: We ask for a jury poll, Your Honor.

THE COURT: Thank you.

Ladies and gentlemen, you may be seated.

Ladies and gentlemen, counsel has asked for a poll. You will recall that simply means you will be called upon to rise and respond whether your verdict was, in each of the twelve cases, life or death.

The Foreman has indicated, as has been publicly read, that the decision of death was based upon your finding one or more aggravating circumstance which outweighs any mitigating circumstance. He further indicated that the aggravating circumstance was No. 3; the mitigating circumstance was No. 1.

I will call upon each of you individually. I will ask you to rise and indicate whether your verdict in each case,

what it was, and whether or not you agreed with the statement made by the Foreman that you found one aggravating circumstance as noted, one mitigating circumstance as noted, and that the aggravating circumstance outweighed the mitigating.

[2,333] THE COURT: Marie Parise, will you tell me, please, your verdict, your sentence in the case of Regina Clemens.

JUROR NO. 1, MARIE PARISE: Death.

THE COURT: And was that on the basis – on what basis was that if you can tell me?

JUROR NO. 1: One or more aggravated circumstance that outweighed any mitigating circumstance or circumstances.

THE COURT: And what number aggravating circumstance did you find?

JUROR NO. 1: Three.

THE COURT: What mitigating circumstance did you find?

JUROR NO. 1: One.

THE COURT: With regard to Information No. 1519-E, Susan Yuhas Banks, what was your sentence?

JUROR NO. 1: Death.

THE COURT: And was that based on the very same then criteria?

JUROR NO. 1: Yes, sir.

THE COURT: What was your sentence in 1519-C, Bowendy Banks?

JUROR NO. 1: Death.

THE COURT: Was that based on the same criteria, or anything different?

JUROR NO. 1: The same.

[2,334] THE COURT: On No. 1519-D, Dorothy Lyons, what is your sentence?

JUROR NO. 1: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 1: Yes, sir.

THE COURT: No. 1519-A, Nancy Lyons, what was your sentence?

JUROR NO. 1: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 1: Yes, sir.

THE COURT: And in the case of Foraroude Banks, what was your sentence?

JUROR NO. 1: Death.

THE COURT: And was that based on the same circumstances – the same mitigating and same aggravating?

JUROR NO. 1: Yes, sir.

THE COURT: No. 1519-F, Mauritania Banks, what was your sentence?

JUROR NO. 1: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 1: Yes, sir.

THE COURT: And in No. 1519-B, Montanzima Banks, [2,335] what was your sentence?

JUROR NO. 1: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 1: Yes, sir.

THE COURT: And in No. 1508, Kissmayu Banks, your sentence?

JUROR NO. 1: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 1: Yes, sir.

THE COURT: And in No. 1290, Sharon Mazzillo?

JUROR NO. 1: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 1: Yes, sir.

THE COURT: And No. 1507, Scott Mazzillo?

JUROR NO. 1: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 1: Yes, sir.

THE COURT: And No. 1506, Alice Mazzillo?

JUROR NO. 1: Death.

THE COURT: Thank you. You may be seated.

Mrs. Young, tell us, please, your sentence in [2,336] No. 1519-G, Regina Clemens.

JUROR NO. 2, NANCY KRAMER YOUNG: Death.

THE COURT: And will you tell us if that was based on the criteria set forth by the Foreman.

JUROR NO. 2: Yes.

THE COURT: No. 1519-E, Susan Yuhas Banks, will you tell us, please, your sentence.

JUROR NO. 2: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 2: Yes.

THE COURT: Bowendy Banks, No. 1519-C?

JUROR NO. 2: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 2: Yes.

THE COURT: No. 1519-D, Dorothy Lyons?

JUROR NO. 2: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 2: Yes.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 2: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 2: Yes.

[2,337] THE COURT: Next, Information No. 1519, Foraroude Banks?

JUROR NO. 2: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 2: Yes.

THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 2: Death.

THE COURT: Same Criteria?

JUROR NO. 2: Yes.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 2: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 2: Yes.

THE COURT: No. 1508, Kissmayu Banks?

JUROR NO. 2: Death.

THE COURT: Same criteria?

JUROR NO. 2: Yes.

THE COURT: No. 1290, Sharon Mazzillo?

JUROR NO. 2: Death.

THE COURT: And that was based on the same criteria?

JUROR NO. 2: Yes, Your Honor.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 3: Death.

[2,338] THE COURT: Based on the same criteria?

JUROR NO. 2: Yes.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 2: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 2: Yes.

THE COURT: Thank you.

DEFENDANT: It's not your fault. You were lied to, ma'am. A two-hour exhumation would have proved me innocent.

THE COURT: All right, Mr. Banks.

Mr. Kaib, No. 1519-G, will you tell us, please, your sentence, sir.

JUROR NO. 3, WILLIAM KAIB: Death.

THE COURT: And was that based on the criteria outlined by the Foreman?

JUROR NO. 3: Yes.

THE COURT: No. 1519-E, Susan Yuhas Banks, your sentence?

JUROR NO. 3: Death.

THE COURT: Was that on the same criteria?

JUROR NO. 3: Yes, sir.

THE COURT: No. 1519-C, Bowendy Banks?

JUROR NO. 3: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 3: Yes, sir.

[2,339] THE COURT: No. 1519-D, Dorothy Lyons?

JUROR NO. 3: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 3: Yes, sir.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 3: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 3: Yes.

THE COURT: No. 1519, Foraroude Banks?

JUROR NO. 3: Death.

THE COURT: Was that on the same criteria?

JUROR NO. 3: Yes, sir.

THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 3: Death.

THE COURT: And was that on the same criteria?

JUROR NO. 3: Yes, sir.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 3: Death.

THE COURT: Was that on the same basis or criteria?

JUROR NO. 3: Yes, sir.

THE COURT: No. 1508, Kissmayu?

JUROR NO. 3: Death.

THE COURT: And is that based on the same criteria?

JUROR NO. 3: Yes, sir.

THE COURT: No. 1290, Sharon Mazzillo?

JUROR NO. 3: Death.

[2,340] THE COURT: Was that based on the same criteria?

JUROR NO. 3: Yes, sir.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 3: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 3: Yes, sir.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 3: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 3: Yes, sir.

THE COURT: Thank you.

Mr. Fleming, will you tell us, please, your sentence in No. 1519-G, Regina Clemens.

JUROR NO. 4, ROBERT FLEMING, JR.: Death.

THE COURT: And was that based on the findings announced by the Foreman?

JUROR NO. 4: Yes, it was, Your Honor.

THE COURT: No. 1519-E, Susan Yuhas Banks, will you tell us, please, your sentence.

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, sir.

THE COURT: No. 1519-C, Bowendy Banks, what was [2,341] your sentence?

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, Your Honor.

THE COURT: No. 1519-D, Dorothy Lyons, what was your sentence?

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, Your Honor.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, Your Honor.

THE COURT: No. 1519, Foraroude Banks?

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, Your Honor.

THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, Your Honor.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, Your Honor.

[2,342] THE COURT: No. 1508, Kissmayu Banks?

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, Your Honor.

THE COURT: Sharon Mazzillo, No. 1290?

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, Your Honor.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, Your Honor.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 4: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 4: Yes, Your Honor.

THE COURT: Thank you.

Susan Hoffman, tell us, please, your sentence in No. 1519-G, Regina Clemens.

JUROR NO. 5, SUSAN HOFFMAN: Death.

THE COURT: And was that based on the criteria announced by the Foreman?

JUROR NO. 5: Yes.

THE COURT: In No. 1519-E, Susan Yuhas Banks, what was your sentence?

JUROR NO. 5: Death.

[2,343] THE COURT: Was that on the same criteria?

JUROR NO. 5: Yes.

THE COURT: No. 1519-C, Bowendy Banks?

JUROR NO. 5: Death.

THE COURT: And was that on the same criteria?

JUROR NO. 5: Yes.

THE COURT: No. 1519-D, Dorothy Lyons?

JUROR NO. 5: Death.

THE COURT: And was that on the same criteria?

JUROR NO. 5: Yes.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 5: Death.

THE COURT: And was that on the same criteria?

JUROR NO. 5: Yes.

THE COURT: No. 1519, Foraroude Banks?

JUROR NO. 5: Death.

THE COURT: And was that on the same criteria?

JUROR NO. 5: Yes.

THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 5: Death.

THE COURT: And was that on the same criteria?

JUROR NO. 5: Yes.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 5: Death.

THE COURT: Was that on the same criteria?

JUROR NO. 5: Yes.

[2,344] THE COURT: No. 1508, Kissmayu Banks?

JUROR NO. 5: Death.

THE COURT: Was that on the same criteria?

JUROR NO. 5: Yes.

THE COURT: No. 1290, Sharon Mazzillo?

JUROR NO. 5: Death.

THE COURT: And was that on the same criteria?

JUROR NO. 5: Yes.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 5: Death.

THE COURT: And was that on the same criteria?

JUROR NO. 5: Yes.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 5: Death.

THE COURT: And was that on the same criteria?

JUROR NO. 5: Yes.

THE COURT: Thank you.

Mr. Fuchs, will you tell me, please, your sentence in the case of Regina Clemens, 1519-G.

JUROR NO. 6, JOSEPH FUCHS: Death.

THE COURT: And was that based on the criteria announced by the Foreman?

JUROR NO. 6: Yes, it is.

THE COURT: No. 1519-E, Susan Yuhas Banks?

JUROR NO. 6: Death.

[2,345] THE COURT: Was that based on the same criteria?

JUROR NO. 6: Yes.

THE COURT: No. 1519-C, Bowendy Banks?

JUROR NO. 6: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 6: Yes, Your Honor.

THE COURT: No. 1519-D, Dorothy Lyons?

JUROR NO. 6: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 6: Yes, Your Honor.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 6: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 6: Yes, Your Honor.

THE COURT: No. 1519, Foraroude Banks?

JUROR NO. 6: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 6: Yes, Your Honor.

THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 6: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 6: Yes, Your Honor.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 6: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 6: Yes.

[2,346] THE COURT: No. 1508, Kissmayu Banks?

JUROR NO. 6: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 6: Yes, Your Honor.

THE COURT: No. 1290, Sharon Mazzillo?

JUROR NO. 6: Death

THE COURT: Was that based on the same criteria?

JUROR NO. 6: Yes, Your Honor.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 6: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 6: Yes, Your Honor.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 6: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 6: Yes.

THE COURT: Thank you.

Mr. Boory, tell us your sentence in No. 1519-G, Regina Clemens.

JUROR NO. 7, THOMAS R. BOORY: Death.

THE COURT: And was that based upon the criteria you announced publicly?

JUROR NO. 7: Yes, Your Honor.

THE COURT: No. 1519-E, Susan Yuhas Banks?

JUROR NO. 7: Death.

[2,347] THE COURT: Was that on the same – based on the same criteria?

JUROR NO. 7: Yes.

THE COURT: No. 1519-C, Bowendy Banks?

JUROR NO. 7: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 7: Yes.

THE COURT: No. 1519-D, Dorothy Lyons?

JUROR NO. 7: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 7: Yes, sir.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 7: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 7: Yes, sir.

THE COURT: No. 1519, Foraroude Banks?

JUROR NO. 7: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 7: Yes.

THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 7: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 7: Yes, sir.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 7: Death.

[2,348] THE COURT: Was that based on the same criteria?

JUROR NO. 7: Yes.

THE COURT: No. 1508, Kissmayu Banks?

JUROR NO. 7: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 7: Yes.

THE COURT: No. 1290, Sharon Mazzillo?

JUROR NO. 7: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 7: Yes.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 7: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 7: Yes.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 7: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 7: Yes, Your Honor.

THE COURT: Thank you.

Beatrice Colling, will you tell us, please, your sentence in Information 1519-G, Regina Clemens.

JUROR NO. 8, BEATRICE COLLING: Death.

THE COURT: Was that based on the criteria announced by the Foreman?

JUROR NO. 8: Yes, sir.

[2,349] THE COURT: Tell me your sentence in 1519-E, Susan Yuhas Banks.

JUROR NO. 8: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 8: Yes.

THE COURT: 1519-C, Bowendy Banks?

JUROR NO. 8: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 8: Yes.

THE COURT: No. 1519-D, Dorothy Lyons?

JUROR NO. 8: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 8: Yes.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 8: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 8: Yes.

THE COURT: No. 1519, Foraroude Banks?

JUROR NO. 8: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 8: Yes.

THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 8: Death.

THE COURT: And was that based on the same criteria?

[2,350] JUROR NO. 8: Yes, sir.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 8: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 8: Yes, sir.

THE COURT: No. 1508, Kissmayu Banks?

JUROR NO. 8: Death.

THE COURT: And was that based on the same criteria?

JUROR NO. 8: Yes.

THE COURT: No. 1290, Sharon Mazzillo?

JUROR NO. 8: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 8: Yes, sir.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 8: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 8: Yes.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 8: Death.

THE COURT: Was that based on the same criteria?

JUROR NO. 8: Yes, sir.

THE COURT: Thank you.

Ms. Steele, will you tell me your sentence in [2,351] No. 1519-G, Regina Clemens.

JUROR NO. 9, SHEILA STEELE: Death.

THE COURT: And is that based on the criteria announced by the Foreman?

JUROR NO. 9: Yes.

THE COURT: Tell me your verdict in 1519-E, Susan Yuhas Banks.

JUROR NO. 9: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 9: Yes.

THE COURT: No. 1519-C, Bowendy Banks?

JUROR NO. 9: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 9: Yes, it is.

THE COURT: No. 1519-D, Dorothy Lyons?

JUROR NO. 9: Death.

THE COURT: And is that based on the same criteria?

JUROR NO. 9: Yes.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 9: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 9: Yes, it is.

THE COURT: Foraroude Banks, No. 1519?

JUROR NO. 9: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 9: Yes.

[2,352] THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 9: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 9: Yes.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 9: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 9: Yes, it is.

THE COURT: No. 1508, Kissmayu Banks?

JUROR NO. 9: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 9: Yes.

THE COURT: No. 1290, Sharon Mazzillo?

JUROR NO. 9: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 9: Yes.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 9: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 9: Yes, it is.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 9: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 9: Yes.

THE COURT: Thank you.

[2,353] THE COURT: Miss Brown, tell me your sentence in No. 1519-G, Regina Clemens.

JUROR NO. 10, STEPHANIE BROWN: Death.

THE COURT: Is that based upon the criteria announced by the Foreman?

JUROR NO. 10: Yes.

THE COURT: Tell me your verdict in 1519-E, Susan Yuhas Banks.

JUROR NO. 10: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 10: Yes, it is.

THE COURT: No. 1519-C, Bowendy Banks?

JUROR NO. 10: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 10: Yes, it is.

THE COURT: No. 1519-D, Dorothy Lyons?

JUROR NO. 10: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 10: Yes, it is.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 10: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 10: Yes, it is.

THE COURT: No. 1519, Foraroude Banks?

JUROR NO. 10: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 10: Yes, it is.

[2,354] THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 10: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 10: Yes, it is.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 10: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 10: Yes, it is.

THE COURT: No. 1508, Kissmayu Banks?

JUROR NO. 10: Death.

THE COURT: And is that based on the same criteria?

JUROR NO. 10: Yes, it is.

THE COURT: No. 1290, Sharon Mazzillo?

JUROR NO. 10: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 10: Yes.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 10: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 10: Yes, it is.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 10: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 10: Yes, it is.

THE COURT: Thank you.

[2,355] THE COURT: Miss Nelson, will you give me your verdict, your sentence in 1519-G, Regina Clemens.

JUROR NO. 11, RENEE NELSON: Death.

THE COURT: Is that based upon the criteria announced by the Foreman?

JUROR NO. 11: Yes, Your Honor.

THE COURT: No. 1519-E, Susan Yuhas Banks.

JUROR NO. 11: Death.

THE COURT: And is that based upon the criteria?

JUROR NO. 11: Yes, Your Honor.

THE COURT: No. 1519-C, Bowendy Banks?

JUROR NO. 11: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 11: Yes, Your Honor.

THE COURT: 1519-D, Dorothy Lyons?

JUROR NO. 11: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 11: Yes, Your Honor.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 11: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 11: Yes, Your Honor.

THE COURT: No. 1519, Foraroude Banks?

JUROR NO. 11: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 11: Yes, Your Honor.

[2,356] THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 11: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 11: Yes, Your Honor.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 11: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 11: Yes, Your Honor.

THE COURT: No. 1508, Kissmayu Banks?

JUROR NO. 11: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 11: Yes, Your Honor.

THE COURT: No. 1290, Sharon Mazzillo?

JUROR NO. 11: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 11: Yes, Your Honor.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 11: Death.

THE COURT: And is that based on the same criteria?

JUROR NO. 11: Yes, Your Honor.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 11: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 11: Yes, Your Honor.

THE COURT: Thank you.

[2,357] THE COURT: Mary Ellen Nehrig, will you tell me your sentence in No. 1519-G, Regina Clemens.

JUROR NO. 12, MARY ELLEN NEHRIG: Death.

THE COURT: And is that based upon the criteria announced by the Foreman?

JUROR NO. 12: Yes.

THE COURT: No. 1519-E, Susan Yuhas Banks.

JUROR NO. 12: Death.

THE COURT: Is that based upon the same criteria?

JUROR NO. 12: Yes.

THE COURT: No. 1519-C, Bowendy Banks?

JUROR NO. 12: Death.

THE COURT: And is that based upon the same criteria?

JUROR NO. 12: Yes.

THE COURT: No. 1519-D, Dorothy Lyons?

JUROR NO. 12: Death.

THE COURT: And is that based on the same criteria?

JUROR NO. 12: Yes.

THE COURT: No. 1519-A, Nancy Lyons?

JUROR NO. 12: Death.

THE COURT: And is that based on the same criteria?

JUROR NO. 12: Yes.

THE COURT: No. 1519, Foraroude Banks?

JUROR NO. 12: Death.

[2,358] THE COURT: And is that based on the same criteria?

JUROR NO. 12: Yes.

THE COURT: No. 1519-F, Mauritania Banks?

JUROR NO. 12: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 12: Yes.

THE COURT: No. 1519-B, Montanzima Banks?

JUROR NO. 12: Death.

THE COURT: And is that based on the same criteria?

JUROR NO. 12: Yes.

THE COURT: No. 1508, Kissmayu Banks?

JUROR NO. 12: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 12: Yes.

THE COURT: No. 1290, Sharon Mazzillo?

JUROR NO. 12: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 12: Yes.

THE COURT: No. 1507, Scott Mazzillo?

JUROR NO. 12: Death.

THE COURT: Is that based on the same criteria?

JUROR NO. 12: Yes.

THE COURT: No. 1506, Alice Mazzillo?

JUROR NO. 12: Death.

THE COURT: And is that based on the same criteria?

JUROR NO. 12: Yes.

[2,359] THE COURT: Thank you.

The twelve jurors having responded that their sentence is death on each of the Informations, the verdicts and sentences are so recorded.

Is there anything further, gentlemen?

MR. SKLAROSKY: No, Your Honor.

MR. GILLESPIE: No, Your Honor.

* * *

COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
:
v. : OF LUZERNE COUNTY *
: CRIMINAL
GEORGE EMIL BANKS :
: NO. 1519E OF 1982
: (SUSAN YUHAS BANKS)

VERDICT

1. WE THE JURY UNANIMOUSLY SENTENCE THE DEFENDANT IN THE ABOVE MATTER TO

✓ DEATH
_____ LIFE IMPRISONMENT

2. (TO BE COMPLETED IF THE SENTENCE IS DEATH.) WE THE JURY HAVE FOUND UNANIMOUSLY

_____ AT LEAST ONE AGGRAVATING CIRCUMSTANCE AND NO MITIGATING CIRCUMSTANCE. THE AGGRAVATED CIRCUMSTANCE(S) (IS) (ARE):

1. _____ IN THE COMMISSION OF THE OFFENSE THE DEFENDANT KNOWINGLY CREATED A GRAVE RISK OF DEATH TO ANOTHER PERSON IN ADDITION TO THE VICTIM OF THE OFFENSE.

2. _____ THE DEFENDANT HAS A SIGNIFICANT HISTORY OF FELONY CONVICTIONS INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON.

3. _____ THE DEFENDANT HAS BEEN CONVICTED OF ANOTHER FEDERAL OR STATE OFFENSE, COMMITTED EITHER BEFORE OR AT THE TIME OF THE OFFENSE AT ISSUE, FOR WHICH A SENTENCE OF LIFE IMPRISONMENT OR DEATH WAS IMPOSABLE OR THE DEFENDANT WAS UNDERGOING A SENTENCE OF LIFE IMPRISONMENT FOR ANY REASON AT THE TIME OF THE COMMISSION OF THE OFFENSE.

OR

✓ ONE OR MORE AGGRAVATED CIRCUMSTANCE WHICH OUTWEIGH ANY MITIGATING CIRCUMSTANCE OR CIRCUMSTANCES.

THE AGGRAVATING CIRCUMSTANCE(S) (IS) (ARE):

1. _____ IN THE COMMISSION OF THE OFFENSE THE DEFENDANT KNOWINGLY CREATED A GRAVE RISK OF DEATH TO ANOTHER PERSON IN ADDITION TO THE VICTIM OF THE OFFENSE.

2. _____ THE DEFENDANT HAS A SIGNIFICANT HISTORY OF FELONY CONVICTIONS INVOLVING THE USE OF THREAT OF VIOLENCE TO THE PERSON.

3. ✓ THE DEFENDANT HAS BEEN CONVICTED OF ANOTHER FEDERAL OR STATE OFFENSE, COMMITTED EITHER BEFORE OR AT THE TIME OF THE OFFENSE AT ISSUE, FOR WHICH A SENTENCE OF LIFE IMPRISONMENT OR DEATH WAS IMPOSABLE OR THE DEFENDANT WAS UNDERGOING A SENTENCE OF LIFE IMPRISONMENT FOR ANY REASON AT THE TIME OF THE COMMISSION OF THE OFFENSE.

THE MITIGATING CIRCUMSTANCE(S) (IS) (ARE):

1. ✓ THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

2. _____ THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

3. _____ ANY OTHER MITIGATING MATTER CONCERNING THE CHARACTER OR RECORD OF THE DEFENDANT OR THE CIRCUMSTANCES OF HIS OFFENSE.

/s/ Thomas R. Boory
FOREPERSON

* An identical and separate verdict slip was completed for each of the following victims: Bowendy Banks, Regina Clemens, Dorothy Lyons, Nancy Lyons, Fouraroude

Banks, Mauritania Banks, Montanzuma Banks, Kismayu Banks, Sharon Mazzillo, Scott Mazzillo, Alice Mazzillo, and Susan Yuhas Banks. The jury's findings were identical for each.

521 A.2d 1

Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee,
v.
George Emil **BANKS**, Appellant

Argued Oct. 20, 1986.
Decided Feb. 13, 1987.
Reargument Denied May 28, 1987.

Basil G. Russin, Al Flora, Jr., Wilkes-Barre, for appellant.

Robert J. Gillespie, Jr., Dist. Atty., Joseph C. Giebus, Asst. Dist. Atty., Wilkes-Barre, Marion E. MacIntyre, Deputy Atty. Gen., Harrisburg, for appellee.

Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, HUTCHINSON, ZAPPALA and PAPADAKOS, JJ.

OPINION OF THE COURT

LARSEN, Justice.

In the early morning hours of September 25, 1982, George Emil Banks, appellant, went on a rampage in and near the City of Wilkes-Barre in Luzerne County. In the space of about one hour, appellant shot fourteen people with a Colt AR-15 semi-automatic rifle, killing thirteen and wounding one. All but one of the dead were the women and children who made up appellant's extended family; the other two victims were strangers (one survived) who were in the wrong place at the wrong time.

Following a lengthy jury trial before the Honorable Patrick J. Toole in the Court of Common Pleas of Luzerne

County (with a jury selected in Allegheny County), appellant was convicted on June 21, 1983 on twelve counts of murder of the first degree. He was also convicted of murder of the third degree, attempted murder, aggravated assault, recklessly endangering another person, robbery and theft of a motor vehicle. The next day, June 22, 1983, in a separate sentencing proceeding before the same jury, appellant received twelve sentences of death. On October 17, 1985, the Court of Common Pleas of Luzerne County, per Judge Toole, denied appellant's post-verdict motions for a new trial and/or in arrest of judgment. Appellant was formally sentenced on November 22, 1985,[1] and he now appeals his convictions and judgments of sentence.[2] We affirm.

The extensive trial record in this case, viewed in the light most favorable to the Commonwealth as verdict winner, discloses the following. On the evening of September 24, 1982, appellant attended a birthday party for one Stanley O'Brien at the Galbraith family residence in Wilkes-Barre. Appellant arrived at the party in the vicinity of 9:00-9:30 p.m., accompanied by two of the victims, Dorothy Lyons and Regina Clemens, each appellant's girlfriend. Also present at the party was another victim, Susan Yuhas, Mrs. Clemens' sister and also a girlfriend of

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[1] In addition to the twelve sentences of death, which were made "consecutive," appellant received consecutive sentences of imprisonment of ten to twenty years on the conviction for murder of the third degree, five to ten years on the conviction for attempted murder, and ten to twenty years on the conviction for robbery. The remaining convictions were deemed to have merged for sentencing purposes.

[2] This Court has direct appellate jurisdiction over such appeals. 42 Pa.C.S.A. §§ 722(4) and 9711(h)(1); Pa.R.A.P.Rule 702(b).

appellant. While at the party appellant drank some beer, played darts and conversed with numerous guests. Shortly after 9:30 p.m., appellant exchanged "T-shirts" with Sharon Gomb, as each admired or joked about the sayings printed on each other's shirt. Appellant's T-shirt read: "Kill Them All And Let God Sort It Out."[3] Appellant's companions, Ms. Lyons and Ms. Clemens, appeared to become upset with this exchange of shirts. Numerous guests and hosts at the party observed appellant drink some beer, but testified that his speech and movements were "normal" and coordinated and that he did not appear to be intoxicated.

Appellant and Regina Clemens left the party in the vicinity of 10:30 p.m. Between 12:00-1:00 a.m. on September 25, 1982, appellant called the Galbraith house and spoke with Dorothy Lyons. After she hung up the phone, she was very upset and crying, and she asked her nephew, David Galbraith, to get appellant's rifle for her. The rifle, a Colt AR-15, had been kept at the Galbraith house for several weeks. Ms. Lyons took the rifle, which was established by ballistics and other evidence as the murder weapon, and left the party after 1:00 a.m. in a car, accompanied by Susan Yuhas.

Kenneth Scott knew appellant and he testified that he saw him in the parking lot of the Sherman Hills Apartments at approximately 1:15 a.m. Appellant was carrying a garbage bag containing several small boxes. Ms. Lyons

[3] Ms. Gomb, who changed her shirt in a separate room with a companion actually exchanging the shirts, was wearing a shirt which read: "I Have A Drinking Problem – I Can't Get Enough."

had an apartment in the Sherman Hills Apartments in Wilkes-Barre and had stored boxes of ammunition there for appellant. (Small boxes of ammunition were found in the house where appellant eventually surrendered to police.) When Mr. Scott called to appellant and walked toward him, appellant told Mr. Scott that he ought to be careful yelling at people like that, he could get himself shot. The two spoke briefly and appellant seemed to be upset, although his speech was understandable and "normal," as was his walking.

At approximately 2:00 a.m., a group of four teenagers had left a friend's house on Schoolhouse Lane in Wilkes-Barre and were walking to their car when they heard a series of gunshots which seemed to be coming from 28 Schoolhouse Lane (appellant's home). The four were Raymond Hall, James Olson, Tommy Demellier and Molly McBride. At this time, appellant came out from the back of the house walking toward the group when Raymond Hall, recognizing appellant, stated "I know you." Appellant responded "Yeah, you're not going to live to tell anybody about this," and he aimed the AR-15 at Mr. Hall and shot him fatally. He then turned toward James Olson and shot him. Mr. Olson, although seriously wounded, survived to testify at trial. Thomas Demellier knocked Ms. McBride to the ground, seeking cover. Appellant, holding the rifle, dressed in green army fatigues with an ammunition bandolier around his chest and shoulders, backed away from them.

Later that morning, eight women and children were found shot to death at appellant's home at 28 Schoolhouse Lane. Most had been shot through the head at close range. The dead were: Susan Yuhas (age: twenty-three), and her two children to appellant, Bowendy Banks (age: four) and

Mauritania Banks (age: one) who resided with appellant; Dorothy Lyons (age: twenty-nine), and her two children, Foraroude Banks (age: one) and Nancy Lyons (not appellant's daughter; age: eleven) who sometimes resided with appellant; Regina Clemens (age: twenty-nine) and her daughter to appellant, Montanzima Banks (age: six), who had resided at 28 Schoolhouse Lane until about two weeks before the shooting.

Joseph Yencha had been drinking at a nearby lounge, the Cabaret, until about 2:10 a.m. on September 25, 1982. He was seated in his car when appellant walked up to him, pointed the rifle at his head, and told him to "move over or I'll blow your f---ing head off." Mr. Yencha moved over, appellant got behind the wheel and he told Mr. Yencha to be quiet, he didn't want any more trouble because he had just "killed his two children." Appellant asked Mr. Yencha if he wanted to get out, then he stopped the car, allowed him to get out, and told him that he would leave the car where it could be found. The car was found later that day, with an unopened bottle of gin and a bullet cartridge in the car.

At 2:30 a.m., shots were heard at the Heather Highlands Trailer Park in nearby Jenkins Township. Residents of the trailer park called the police when they heard the shots and then a male voice shouting "That's what you get for f---ing with me. You f--- with me some more, I'll come back and kill the rest of you." When police officers arrived, they found Angelo Vital and Keith Mazzillo, alive and unharmed, outside the Mazzillo trailer. They also found the bodies of Sharon Mazzillo (age: twenty-four), a former girlfriend of appellant's, and their son, Kissmayu Banks (age: five), as well as Sharon's mother, Alice Mazzillo (age: forty-seven) and Scott Mazzillo (age: seven), Sharon's

nephew. Angelo Vital and his brother, Keith Mazzillo, Alice Mazzillo's sons, witnessed the horrifying events at the trailer, and they testified at trial.

Angelo Vital, ten years of age at the time of trial, testified that appellant came into the trailer and said "I shot some of my family, now I'm going to shoot some of yours." Appellant then shot Kissmayu who had been asleep on the couch. Sharon and Alice Mazzillo tried to push appellant out of the trailer, and Alice then went into the back room to use the telephone, with Angelo following his mother. Angelo heard another shot and looked out to see appellant chasing Scott Mazzillo, saying "You called my son a nigger." Appellant then shot Scott Mazzillo, kicked him and hit him with the rifle. Appellant turned and fired one shot at Alice Mazzillo as she tried to call the police, striking her in the face and killing her, then left, telling Angelo "I'll get you next time."

Keith Mazzillo, thirteen years of age at the time of trial, testified to the same effect. He heard appellant state "I heard you call my son a little nigger," and saw him choke, kick, hit and shoot Scott Mazzillo. He did not see appellant shoot the others. Sharon Mazzillo's body was found outside the trailer, where Keith had heard her arguing with appellant. Both Angelo Vital and Keith Mazzillo identified the AR-15, introduced into evidence at trial, as the weapon appellant used that morning.

At about 6:00 a.m., appellant arrived at his mother's house. His mother, Mrs. Mary Yelland, told the police that appellant stated "I killed them. I killed them all." Mrs. Yelland called appellant's house and spoke with a police officer. Appellant got on the telephone with Luzerne County Detective James Zardecki and asked how his kids

were. Detective Zardecki told him the children were hospitalized and seriously hurt, but appellant responded "You're lying. I killed them. I know they're dead . . . . Just tell me I killed them and I'll kill myself." After a minute or two of Detective Zardecki trying to convince appellant that his children were alive, and repeated statements by appellant that he knew they were dead, the line went dead. Detective Zardecki had no trouble understanding appellant who was responsive and spoke in a "normal" tone.

After this call, appellant told his mother to drive him to his friend's (Jacob Whitt's) house at 24 Monroe Street in Wilkes-Barre. On their way there, their vehicle was involved in a traffic accident. Appellant stated he was going to kill the other driver, but his mother convinced him not to, and the two drove away. When they arrived at Monroe Street, appellant went into the house, telling his mother he would never see her again. He then went inside and prepared himself for a siege.

Mrs. Yelland returned to her home where, a short time later, police officers came believing appellant was there. Mrs. Yelland informed them appellant was at 24 Monroe Street. Police officers then surrounded the house by about 7:00 a.m.

Between 7:30-8:00 a.m., Mrs. Geraldine Whitt called her son Jacob's home to talk with him, and appellant answered the telephone. They recognized each other's voices. Mrs. Whitt asked appellant what he was doing there, and he replied "I killed them all. They're all dead. I killed my whole family . . . . I barricaded myself in Jake's house and I came here to die." He also told Mrs. Whitt that it was too late to pray for him now, "but you can pray for

my soul." Mrs. Whitt had no trouble understanding appellant, who sounded calm and coherent.

Telephone communications were established by police officers with appellant. Various civilians and police officers spoke with appellant, trying to convince him that his children were alive and in need of blood, and that he should therefore give himself up. Police arranged to have a radio broadcast played to corroborate the ruse that appellant's children were alive. While he persisted to tell people that they were lying because he knew he killed his children who he did not want "to grow up in a white racist world," eventually he gave himself up, at 11:15 a.m., after speaking with Mr. Robert Brunson, an acquaintance of appellant. Appellant told Officer Donald Smith he would have to break the window to hand the gun out, which he did, and he asked the officer not to shoot him. After handing out the AR-15 with a "banana" ammunition clip attached and two additional clips, he came out of the house with his hands above his head, as he had been instructed. Neither Officer Smith nor Mr. Brunson, nor any of those who spoke with appellant that morning, had any difficulty understanding appellant, who was calm and responsive to questions and instructions. Most of the witnesses testified that appellant did not appear to be intoxicated, although there was some evidence that he had an odor of alcohol about him.

Appellant was taken to the Wilkes-Barre police station and advised of his constitutional rights by Detective Patrick Curly. He told police officers there that he knew they had been lying to him about the children being alive. He further stated to Detective William Maguire that "he wished he was dead, because he stated that the State was going to kill him, anyway, in the electric chair."

The Commonwealth also introduced evidence from various witnesses to show appellant's apparent motive for his rampage. This evidence supported the inference that appellant was disturbed about losing control over his extended family. Regina Clemens had moved out of appellant's residence about two weeks before the shooting spree, and was planning to move to Florida to get away from appellant. In the week before the murders, appellant was seen slapping and hitting Susan Yuhas, Regina Clemens' sister, stating "You're just like your sister Gina. You're going to leave just like her."

Appellant's mental condition at the time of the shootings was a major issue at trial, and the expert opinions of the psychiatric witnesses for the defense were diametrically opposed to the opinions of the Commonwealth's expert psychiatric witnesses. Defense counsel, the Luzerne County Public Defender and two assistant public defenders, presented numerous lay witnesses and three psychiatrists in an attempt to establish that appellant was legally insane under the *M'Naghten* rule, which despite repeated challenges remains the test for determining legal sanity and criminal responsibility in this Commonwealth. *Commonwealth v. Oblek,* 496 Pa. 519, 437 A.2d 1162 (1981). Under *M'Naghten,* a defendant is legally insane, and absolved of criminal responsibility, if "at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know what he was doing was wrong." *Commonwealth v. Roberts,* 496 Pa. 428, 434, 437 A.2d 948 (1981), quoting *The Queen v. M'Naghten,* 10 Cl. & Fin. 200, 8 Eng.Rep. 718 (1843). Or as it is sometimes stated in the streamlined version, "an

accused is criminally responsible [and not legally insane] unless at the time of committing the act, due to a defect of reason or disease of the mind, the accused (1) did not know the nature and quality of the act or (2) did not know that the act was wrong." *Commonwealth v. Tempest,* 496 Pa. 436, 440, 437 A.2d 952 (1981) (citations omitted).

In addition to the insanity defense, counsel also presented the defense of diminished capacity, *Commonwealth v. Walzack,* 468 Pa. 210, 360 A.2d 914 (1976), attempting to reduce appellant's degree of guilt by showing that, because of his mental condition and intoxication due to consumption of alcohol (beer and gin) and pills (Dilantin), he was unable to form the specific intent to commit murder of the first degree. There was evidence that appellant drank beer at the Galbraith's party, and several witnesses detected an odor of alcohol about him the following morning. Additionally, appellant had told lay witnesses and psychiatrists that he had been drinking gin for several days prior to and including September 25, 1982 and that, after he left the birthday party, he went home and took some pills (Dilantin) which he washed down with gin, and then passed out.

As to the insanity defense, lay and psychiatric witnesses for the defense presented a profile of a disturbed and paranoid man. Appellant, a prison guard at the state correctional institution in Camp Hill, was forty years of age at the time of the murders. He grew up taunted and tormented by both blacks and whites as he was the son of a black father and a white mother. Appellant was constantly called "half-breed," "zebra," and other derogatory names, as was his brother. Through the years, he developed a persecution complex and became obsessed with the

paranoid delusion that there were soon to be international race wars and uprisings. In fact, he had written a chapter of a novel, featuring himself and his sons, dealing with survival in the aftermath of a race war. He prepared himself for the race wars by purchasing weapons, planting food along escape trails in the woods and reading the standard "survivalist" fare such as *Soldier of Fortune* magazine. At various times, he had spoken of killing himself, of killing people at a shopping mall, and of killing his children rather than see them brought up as he had been in a racist society.

The defense called three psychiatrists as experts. All three agreed, essentially, that appellant had been, before, during and after the murders, suffering from a severe mental defect, paranoid psychosis with paranoid delusions. All also agreed that, when dealing in the area of appellant's paranoid delusions concerning racism and race wars, appellant was completely obsessed and singularly focused, but that all other aspects of his personality, including his cognitive functioning, were "normal" and intact. (Appellant had a high I.Q., over 120, and was described as being in the upper five percent of the population based on intelligence.)

Dr. Anthony J. Turchetti, a forensic psychiatrist who was appointed by the lower court in October, 1982, to examine and evaluate appellant, stated that in his opinion, appellant was, on September 25, 1982 (the date of the killings), actively suffering from psychosis paranoia which affected his thoughts, discretion and judgment and

"because of this, I don't think he was capable of distinguishing right from wrong at that time."[4] Dr. DeWitt Weatherly and Dr. Michael K. Spodak also testified as expert witnesses for the defense. Drs. Weatherly and Spodak, both forensic psychiatrists licensed to practice their specialty in Maryland but not in Pennsylvania,[5] each testified that, in his opinion, appellant did not, as a result of his paranoid psychosis, understand the nature and quality of his criminal acts on September 25, 1982 and was unable to distinguish between right and wrong with respect to those acts.

Appellant also took the stand himself, against the advice of counsel, to offer a "partial" defense of a conspiracy against him. This theory will be discussed more fully in discussing appellant's competency to stand trial, but essentially was that appellant was the victim of a racist conspiracy involving, among others, police officers, the Mayor of Wilkes-Barre, the District Attorney's office and the judge. Appellant admitted shooting most of the victims, but claimed that Detective Curly shot and killed two

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[4] Dr. Turchetti had examined appellant on eight occasions in October, 1982 and once in February, 1983. His opinion was based "almost solely" on what appellant told him during these examinations. Dr. Turchetti's opinion was seriously discredited by the prosecutor on cross-examination.

[5] Neither Dr. Weatherly nor Dr. Spodak had previously been an expert witness in a case dealing with insanity under the Pennsylvania M'Naghten standards. Maryland uses, according to these psychiatrists, the more "liberal" American Law Institute standards, namely that an actor is not criminally responsible for his acts where at the time of committing the act, as a result of mental disease or defect, he lacks the substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

of the victims and that Detective Curly and others had moved the corpses, altered their features, "doctored" their wounds and concealed or destroyed evidence, all as a part of a racist conspiracy.

In rebuttal, the Commonwealth introduced lay and expert testimony to establish appellant's sanity. Dr. Park E. Dietz and Dr. Robert L. Sadoff, both of whom are forensic psychiatrists licensed to practice their speciality in Pennsylvania,[6] testified for the Commonwealth. Both psychiatrists reviewed previous psychiatric evaluations of appellant, observed him in court at trial and on previous occasions, examined appellant, reviewed numerous documents and letters, and examined the extensive testimony of witnesses and statements of people who had been in contact with appellant on September 24-25, 1982.

While Drs. Dietz and Sadoff basically agreed with the diagnosis of the defense psychiatrists that appellant suffered from a serious mental defect, paranoia psychosis, which did not otherwise impair his personality, intelligence and cognitive functioning, they did not agree with their expert opinions. Each testified that, in his opinion, appellant was able to know and understand the nature and quality of his acts, to distinguish between right and wrong, and to form the specific intent to murder. Each doctor also seriously questioned the bases for the defense psychiatrists' opposite conclusions. Significant factors in

[6] Dr. Turchetti testified on cross-examination that Dr. Sadoff, the only expert who was board certified as a forensic psychiatrist by the American Board of Forensic Psychiatrists and a frequent publisher of articles and books in the field, was one of the leading psychiatrists in the country.

forming their opinion that appellant knew the nature and quality of his acts and knew his acts were wrong included appellant's behavior and repeated acknowledgements that he knew he had killed his family and children, his threats to kill at least several of the victims before he actually shot them, his threats to return to kill Angelo Vital and Keith Mazzillo, and many other indications that he knew and understood that what he did was wrong.[7] There were also numerous indications of premeditation and planning, including appellant's telephone call to Dorothy Lyons to get the AR-15 for him, and his driving to the Sherman Hills Apartments to get the ammunition.

The jury rejected appellant's defenses and, after deliberating for about five hours, with one request for clarification as to the degrees of homicide, returned its verdicts on June 21, 1983, finding appellant guilty of murder of the first degree on twelve counts, murder of the third degree for the killing of Raymond Hall, attempted murder of James Olson, and on the remaining counts of assault, robbery and theft.

The following day, a sentencing proceeding was conducted before the same jury, pursuant to the Sentencing Code. 42 Pa.C.S.A. § 9711(a). The Commonwealth sought the death penalty on each conviction for murder of the first degree on three aggravating circumstances under section 9711(d), namely that appellant knowingly created a grave risk of death to other persons (d)(7), that appellant

[7] These indications included his belief that he would probably get the electric chair for his deeds, his barricading himself at 24 Monroe Street and his telling Mrs. Whitt to "pray for his soul."

had a significant history of felony convictions involving violence (d)(8), and that appellant had been convicted of another offense committed at the time of the offenses at issue for which a sentence of life imprisonment or death was imposable (d)(10). Appellant presented three mitigating circumstances under section 9711(e), namely that appellant was under the influence of extreme mental or emotional disturbance (e)(2), the capacity of appellant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (e)(3), and "any other evidence of mitigation concerning the character and record of defendant and the circumstances of his offense" (e)(8). After deliberating for almost six hours, the jury returned twelve sentences of death based on its finding of one aggravating circumstance ((d)(10)-other offenses for which death sentence was imposable) which outweighed the one mitigating circumstance it found ((e)(2)-extreme mental or emotional disturbance). 42 Pa.C.S.A. § 9711(c)(iv).

From the foregoing, we have no difficulty in finding the evidence sufficient to sustain appellant's convictions beyond a reasonable doubt.[8] As we have seen, there was overwhelming evidence that appellant premeditated, planned and specifically intended to kill his family

[8] As in all appeals involving a judgment of sentence of death, this Court will review the record to determine whether the evidence is sufficient to sustain the conviction(s) for murder of the first degree, even though the appellant has not specifically challenged the sufficiency of the evidence. *Commonwealth v. Zettlemoyer,* 500 Pa. 16, 26 n. 3, 454 A.2d 937 (1982), *cert. denied,* 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983), *reh'g denied,* 463 U.S. 1236, 104 S.Ct. 31, 77 L.Ed.2d 1452 (1983).

members.[9] And, there was abundant evidence, both from lay witnesses and the Commonwealth's expert and well-qualified psychiatric witnesses, to support the jury's finding that appellant was legally sane and criminally responsible for his acts of September 25, 1982 under *M'Naghten,* and that he possessed the capacity to form the specific intent to kill. *See Commonwealth v. Zettlemoyer, supra* note 8 at 500 Pa. 27-39 (evidence that appellant Zettlemoyer had a "schizoid personality with paranoid features" was insufficient to establish defense of diminished capacity); *Commonwealth v. Weinstein,* 499 Pa. 106, 114, 451 A.2d 1344, 1347 (1982) (psychiatric testimony under *Walzack*/diminished capacity is irrelevant unless "it speaks to mental disorders affecting the cognitive functions [of deliberation and premeditation] necessary to formulate a specific intent"); *Commonwealth v. Tempest, supra* (although mother, who drowned her son and then went downstairs to watch game shows on television until her husband came home was mentally ill, she was nevertheless legally sane under *M'Naghten,* as evidenced by her statements made during and after the drowning); *Commonwealth v. Zlatovich,* 440 Pa. 388, 269 A.2d 469 (1970) (mother who shot her four children rather than see her children taken from her by her husband was legally sane under *M'Naghten;* lay testimony alone was sufficient to rebut the opinion of three defense psychiatrists that mother was insane).

We turn now to appellant's specific assignments of error. Appellant first and principal claim is that the lower

[9] "A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing." 18 Pa.C.S.A. § 2502(a).

court erred in finding him to be competent to stand trial. On February 28, 1983, pursuant to defense counsels' application under section 402-403 of the Mental Health Procedures Act of 1976, Act of July 9, 1976, P.L. 817, No. 143, 50 P.S. §§ 7402-7403 (supp. 1986), a preliminary competency hearing was held at which the court scheduled a full evidentiary hearing. The reason for defense counsels' concern over appellant's competency was his stubborn insistence on pursuing his "conspiracy" theory, i.e., that the police officers, the Mayor of Wilkes-Barre, the District Attorney's office and perhaps the court were conspiring against him in concealing and altering evidence, shooting some of the victims, rearranging some of the corpses and covering up some of their wounds, and obstructing his attempts to expose the "conspiracy." He viewed his trial as a means of "taking the mask off the devil."

The first pre-trial competency hearing was held on March 14, 1983, at which much lay testimony was introduced, as well as the expert opinions of Dr. Michael Spodak (for the defense) and Dr. Robert Sadoff (for the Commonwealth). The lower court allowed broad latitude to both sides to explore appellant's competency. Again, the psychiatric opinions were diametrically opposed. Dr. Spodak testified that, while appellant's cognitive functions and intelligence were reasonably unimpaired, his paranoid delusions of the conspiracy were so strong that he would be substantially unable to understand the nature and object of his proceedings or to participate and assist in his defense. (The Mental Health Act provides that a person shall be deemed incompetent to stand trial if he is "substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense . . . ." 50 P.S. § 7402(a)) Dr. Sadoff, on the other

hand, testified unequivocally that appellant was able to follow the advice of counsel and to participate and assist in the defense, although he might choose not to. He also testified that, in his opinion, appellant fully understood the nature and object of the pending criminal proceedings as a trial to determine his guilt or innocence and sentence if found guilty, even though he choose to use the proceedings to advance his own agenda and to expose the "conspiracy" to the public. On March 18, 1983, the court issued an order declaring appellant was "not substantially unable to understand the nature or object of the proceedings against him, or to participate and assist in his defense," and he directed appellant to stand trial.

At the request of defense counsel, a second pre-trial competency hearing was held on May 6, 1983, with Dr. Sadoff again testifying for the Commonwealth and Dr. DeWitt Weatherly for the defense. Dr. Weatherly stated that, in his opinion, because of appellant's obsessive and paranoid preoccupation with this perceived conspiracy, he would be substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense. On cross-examination, however, Dr. Weatherly conceded that appellant did not have a loss of cognitive function, that he knew he was in a court of law for a competency hearing, that he was charged with thirteen counts of homicide and other offenses for which the penalty could be execution, that he knew what the functions of the various "players" in the criminal judicial system were, that he understood the insanity defense and that he would not be executed if he was found not guilty by reason of insanity, and that he knew he could cooperate with counsel in presenting that defense or he could refuse to cooperate. The crux of Dr. Weatherly's and defense

counsels' position that appellant was incompetent to stand trial was that, despite appellant's cognitive awareness and intellectual capacity, he wanted to use the criminal trial to "go through some sort of sensational, explosive proceeding to reveal his story and . . . wake up the community, arouse the community, precipitate a race war, revolution." In summary, Dr. Sadoff testified for the Commonwealth that his opinion had not changed, and that appellant remained competent to stand trial despite his obsession with a conspiracy and his choice to use the trial as a forum for his personal agenda.

Appellant testified at this proceeding, and verified his obsessive, conspiracy delusion as well as his cognitive abilities to converse, respond to questions appropriately and to understand the nature and object of the proceedings. (For example, when asked by the District Attorney on cross-examination whether he shot Raymond Hall, appellant refused to answer the question "under the Fifth Amendment, whatever that is.") From the bench, the court again declared appellant competent to stand trial.

On May 13, 1983, there was a hearing on the Commonwealth's petition to order a psychiatric evaluation of appellant, with appellant present. Appellant's responsiveness to the court's questions and his overall alertness was apparent at this proceeding.[10] He asked pertinent ques-

[10] For example, the following exchange took place:

DEFENDANT: One thing I'd like to say, sir, if I could?

THE COURT: Sure.

DEFENDANT: I'm willing to cooperate fully with the District Attorney and Dr. Sadoff [in allowing a psychiatric examination], but I would be more inclined to do so after this

(Continued on following page)

tions about the scope of the privilege against self-incrimination, and about the timing of a petition to exhume the bodies of the victims that his attorneys had filed at his insistence (against their judgment). Appellant believed that exhumation would verify his conspiracy theory and show that the victims' corpses had been tampered with before photographs had been taken of the crime scene.

On May 20, 1983, defense counsel filed another petition seeking a competency examination, but did not offer any additional evidence of incompetency. Counsel also filed a petition to withdraw as counsel. The court

business with the – what do you call it? Now, I thoroughly understand everything you said, but I was hoping that perhaps it could be maybe postponed until after we get this business with the exhumation settled, once and for all.

THE COURT: Well, Mr. Banks, I don't control the exhumation application.

DEFENDANT: I understand.

THE COURT: That's in the hands of another judge.

You also understand that we're leaving on Sunday, and so, while I am anxious to move things along, I certainly don't want to prejudice you in any way. That's why I've warned you and I warn you again:

Please remember – everything you say – and I'm sure your attorneys have told you this, time and time again –

DEFENDANT: I'm thoroughly aware of it, yes, sir.

THE COURT: Anything you say that is in any way incriminating, I suggest to you that in your particular position, anything you say may be incriminating.

DEFENDANT: That don't matter to me. All I want to do is get it over with. As far as I'm concerned, you know, I'm dead, anyway.

Notes of Testimony (N.T.), May 13, 1983 at 13-14.

denied these petitions, the gravaman of which was described in Judge Toole's excellent opinion in support of denial of post-verdict motions, as follows:

> Essentially, counsel contend that because of Banks' contention that the trial was part of a conspiracy, because he would not agree to a defense of insanity, because he was not consistent, because he did not heed the advice of his counsel or follow their proposed strategy, and because he was not always rational as they deemed or desired it, that this was clear evidence that he was incompetent to stand trial.
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> Slip op. at 13.

Defense counsel also made three motions for a competency determination, during trial, all of which were denied summarily by the lower court. Two of these requests were predicated on a diagnosis by the Commonwealth's expert witness, Dr. Dietz, that appellant was paranoid and delusional, and upon counsels' belief that this condition rendered appellant incompetent to stand trial. The most vigorous request for a competency determination came prior to appellant's taking the stand against the advice of counsel. A lengthy colloquy preceded appellant's testifying during which he demonstrated his understanding of the proceedings, that he did not have to testify, of the effect that his testifying would have on his right to remain silent and that he would be bound by the same rules of evidence as would anyone else. N.T. June 16, 1983 at 1638-47.

What most concerned counsel was their belief that appellant intended to introduce photographs of some of the corpses, which he believed would prove his conspiracy theory to the jury. Obviously, counsel was concerned about the prejudicial effect that introduction of such photographs

might have on the jury, and about the lik[e]lihood that the Commonwealth would introduce additional photographs of the corpses to disprove appellant's theory. (In fact, this is what occurred at trial, with a comprehensive and appropriate cautionary instruction given by the court at the time the photographs were introduced. *Id.*)

Prior to trial, on May 9, 1983, a suppression hearing was held at which the court ruled that the Commonwealth would not be permitted to introduce any photographs of the corpses. At this hearing, appellant informed the court that he wished to use some of the photographs to prove that the corpses had been tampered with. The court advised appellant that introduction of the photographs might be prejudicial and that if he did introduce some of the photographs at trial, the Commonwealth might then be able to introduce additional photographs. Appellant indicated that he understood, but that he planned to do so anyway.

Appellant now claims that the lower court erred in ruling that he was competent to stand trial. We do not agree.

As noted, a person is incompetent to stand trial where he is "substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense." 50 P.S. § 7402(a). Due process considerations also come into play when the competency of the accused is in question. As this Court stated in *Commonwealth v. Martinez,* 498 Pa. 387, 391, 446 A.2d 899, 901 (1982):

It is well established that:

> "the test to be applied in determining the legal sufficiency of [a defendant's] mental capacity to stand trial . . . is . . . his ability to comprehend his position as one accused of murder and to cooperate with his counsel in making a rational defense. *See Commonwealth v. Moon* [383 Pa. 18, 117 A.2d 96 (1955)], and *Commonwealth ex rel. Hilberry v. Maroney* [417 Pa. 534, 544, 207 A.2d 794, 799 (1965)]. Or stated another way, did he have sufficient ability at the pertinent time to consult with his lawyers with a reasonable degree of rational understanding, and have a rational as well as factual understanding of the proceedings against him. *See Dusky v. United States,* 362 U.S. 402 [80 S.Ct. 788, 4 L.Ed.2d 824] (1960). Otherwise, the proceedings would lack due process: *Bishop v. United States,* 350 U.S. 961 [76 S.Ct. 440, 100 L.Ed. 835] (1956)."
> *Commonwealth ex rel. Hilberry v. Maroney,* 424 Pa. 493, 495, 227 A.2d 159, 160 (1967).

Equally well established is that the person asserting incompetency has the burden of proving incompetency by clear and convincing evidence, 50 P.S. § 7403(a),[11] and that the determination of competency rests in the sound discretion of the trial judge which will not be disturbed absent a clear abuse of discretion. *Commonwealth v. Martinez, supra; Commonwealth v. Ware,* 459 Pa. 334, 356, 329 A.2d 258, 269 (1974); *Commonwealth v. Hart,* 501 Pa. 174, 177,

[11] Prior to passage of the Mental Health Act of 1976, the burden was upon the party asserting incompetency to prove it by a preponderance of the evidence. *Commonwealth v. Kennedy,* 451 Pa. 483, 487, 305 A.2d 890, 892 (1973).

460 A.2d 745 (1983); *Commonwealth v. Davis,* 459 Pa. 575, 330 A.2d 847 (1975).

As we have seen in the preceding recitation of facts, the lower court gave broad latitude and every opportunity to defense counsel to establish appellant's incompetency to stand trial. In ruling that appellant was competent, the court had ample evidence, from lay witnesses and from expert psychiatric witnesses, upon which to base its determination. Moreover, the court also had many opportunities to personally observe appellant not only at his competency hearings and at trial, but also during hearings and arguments on several pre-trial motions.

The court stated in its opinion denying appellant's post-trial motions:

> As the trial Judge, I would also note at this time I had the opportunity to observe Banks' demeanor and participation during the course of the proceedings, and I found nothing to indicate or cast any doubt on his competency to stand trial. His behavior, demeanor and presentations throughout these proceedings corroborated rather than contradicted the finding of competency.

Slip op. at 15, n. 2. At one point during trial, appellant decided to personally cross-examine Coroner Joseph M. Shaver and to use the photographs of some of the corpses in conducting his cross-examination. Prior to conducting the colloquy with appellant preceding appellant's testimony in his own defense, the court responded to defense counsels' concerns for appellant's competency, stating: "Again, the Court is satisfied, and I'm more satisfied as I watch him every day in court, of his competency . . . .

Even his demeanor, his questioning, in my opinion, establish competency again." N.T., June 8, 1983 at 454. The court's personal assessment and determination of appellant's competency were fully supported by the record, and it was well within the court's discretion, therefore, to rule that appellant had not met his burden of demonstrating, by clear and convincing evidence, that he was substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense.[12]

Nevertheless, appellate counsel would have us reverse the lower court's determination of competency because appellant "advanced an irrational and absurd defense" which was "diametrically opposite to the insanity defense raised by defense counsel," because in "no instance could the Defendant follow counsel's advice on any of the substantive issues; i.e., Fifth Amendment rights, insanity, specific intent, diminished capacity, and the introduction of prejudicial photos . . . ," and because he did not understand the nature of the proceedings against him but, rather, viewed them as a "means to uncover the conspiracy against him – to unmask the devil." Brief for Appellant at 31-33. We disagree.

As the lower court correctly stated:

> Lack of cooperation and the failure to heed counsel's advice and/or the failure to agree with

[12] Indeed, there was adequate support on the record for the trial court's determination of competency even under the pre-Mental Health Act of 1976 standard of "preponderance of the evidence." *See* note 11, *supra*.

> counsel's strategy are certainly not to be equated with and do not establish legal incompetency. *The issue is the Defendant's ability to cooperate and not whether he is actually cooperating. Indeed, as the trial Judge noted, there is a factual and legal distinction between inability to assist and being unwilling to assist.* Defense counsel also contend that Banks' belief that a conspiracy existed against him and that he was going to "unmask the devil" establishes his incompetency. It may well be that Banks actually believed that such a conspiracy existed and that the trial was necessary to establish that fact. On the other hand, Banks may have feigned such a belief in hopes of actually promoting the defense of insanity being raised by his counsel which, on the other hand, he indicated he did not desire to assert. *Whatever Banks' intent or strategy was or whether it comported with his counsel's desires or plans – does not change the fact that he was "legally competent" to stand trial.*
>
> Slip op. at 13-14 (emphasis added).

Appellant clearly demonstrated his *ability* to participate and assist in his defense and his understanding of the nature and object of the proceedings. While presentation of his conspiracy theory was against counsels' advice, his bizarre "defense" did not, as counsel suggests, conflict with his defense of insanity. In fact, his "conspiracy" theory and presentation at trial dovetailed quite nicely with the opinions of the expert psychiatric witnesses for the defense, who testified that appellant's obsessive and paranoid delusions about racism and race wars prevented him from understanding the nature and quality of his acts and from knowing that his acts were wrong.

Finally, while it does, indeed, appear that appellant viewed his trial as an opportunity to prove his perceived conspiracy to the jury and to the world, there is ample evidence of record to support the court's determination that appellant understood that he was on trial on thirteen counts of homicide, that he could be sentenced to death if convicted, that he would not be sentenced to death if found not guilty by reason of insanity, that he understood the role and functions of the prosecutors, defense attorneys and judge, and that he was able to assist and participate in his defense even though he chose not to cooperate with counsel nor to heed their advice.

For the foregoing reasons, we hold that the lower court did not err in its determination that appellant was competent to stand trial.

Appellant next argues that the court erred in its instructions to the jury on sanity. Appellant's brief states:

> Consideration being given to the inadequacies of *M'Naghten* in Pennsylvania, [the trial] Court produced its own definition of insanity by (1) recognizing that to be insane, the Defendant must be 'completely or totally unable to understand the nature and quality of his act or completely or totally unable to distinguish between right and wrong . . . .' [N.T., Trial Volume VI, p. 2223]; (2) that knowledge of the nature and quality of the act relates merely to a cognitive awareness of the physical act and its consequences; [N.T., Trial Volume VI, pp. 2224-25]; and (3) that 'wrong' means 'legally or morally' with morality reflecting 'societal standards and not those of a particular individual.' [N.T., Trial Volume VI, p. 2225]. In defining *M'Naghten* with consideration being given to the Commonwealth's burden of proof, the Court charged as follows:

> '[I]n view of what I have said regarding the legal test of insanity and the Commonwealth's burden of proof, you cannot find the Defendant guilty unless you are satisfied beyond a reasonable doubt that at the time of the acts involved, that is, the killings, the attempted murder and the robbery, either the Defendant had no mental disease or defect, or, if he did have a mental disease or defect, that he was not, as a result of such disease or defect, incapable of knowing what he was doing and of judging that it was wrong to do so. That is the test.' [N.T., Trial Volume VI, p. 2226].
>
> An exception to the Court's charge on insanity was taken by Defense Counsel. [N.T., Trial Volume VI, pp. 2237-38].

Brief for Appellant at 38-39.

On appeal, the court's instructions to the jury must be viewed in their entirety and considered as a whole. *Commonwealth v. Zettlemoyer, supra* at 500 Pa. 38, 454 A.2d 937; *Commonwealth v. Tolassi,* 489 Pa. 41, 413 A.2d 1003 (1980). So viewed, we find that the court's instructions fully and adequately delineated the law in this Commonwealth as to legal insanity/criminal responsibility. (The court's entire charge to the jury on the issue of insanity is set forth *infra* as an Appendix to this opinion.)

Appellant's principle challenge to the court's instructions asserts that, under *M'Naghten,* "knowledge" of the nature and quality of the act must entail more than a "cognitive awareness that an act is being committed;"

rather, it must also encompass "a rational appreciation as well of all the social and emotional implications involved in the act and a mental capacity to measure and foresee the consequences of the violent conduct." Brief for Appellant at 37, 41. We agree with the Commonwealth that this position amounts to an indictment of the *M'Naghten* standard, and either misperceives the nature of the *M'Naghten* test or seeks to fundamentally alter it. This we shall not do. In *Commonwealth v. Tempest, supra,* we stated that the *M'Naghten* test can and does embrace those mentally disturbed in the category of those criminally responsible, 496 Pa. at 441, 437 A.2d 952, and is not intended to separate the emotionally disturbed from the emotionally healthy. *Commonwealth v. Demmitt,* 456 Pa. 475, 481, 321 A.2d 627 (1974). And as we said explicitly in *Commonwealth v. Neill,* 362 Pa. 507, 514, 67 A.2d 276, 280 (1949):

> Certainly neither social maladjustment, nor lack of self-control, nor impulsiveness, nor psychoneurosis, nor emotional instability, nor chronic malaria, nor all of such conditions combined, constitute insanity within the criminal conception of that term.

For the Commonwealth to meet its burden of demonstrating that a defendant is legally sane,[13] it most certainly does not have to demonstrate that he or she has a "rational appreciation as well of all the social and emotional

[13] Where there is sufficient evidence to raise the issue of sanity, the burden of proof is on the Commonwealth to establish the defendant's sanity beyond a reasonable doubt. *Commonwealth v. Scarborough,* 491 Pa. 300, 305, 421 A.2d 147 (1980).

implications" or the ability "to measure and foresee the consequences" of the act. As this Court stated long ago in adopting the *M'Naghten* test in this Commonwealth, "to the eye of reason, every murderer may seem a madman, but in the eye of the law he is still responsible . . . . [T]o constitute a sufficient defense on this ground there must be an entire destruction of freedom of the will . . . ." *Commonwealth v. Mosler,* 4 Pa. 264, 268 (1849). Contrary to appellant's position, legal sanity is *not* demonstrated by a murderer's appreciation of the social and emotional implications of the killing nor by his ability to measure and foresee all of the consequences of that act, but rather is demonstrated by the murderer's knowledge that he or she has killed and the knowledge that it was wrong. *Commonwealth v. Tempest, supra; Commonwealth v. Zlatovich, supra; Commonwealth v. Demmitt, supra; Commonwealth v. Metzler,* 499 Pa. 122, 123-24, 451 A.2d 1352 (1982).

Appellant challenges the portion of the court's charge which instructs the jury that "you cannot find the Defendant guilty unless you are satisfied beyond a reasonable doubt that . . . either the Defendant had no mental disease or defect, or, if he did . . . that he was *not . . . incapable of knowing* what he was doing and of judging that it was wrong to do so." Appellant contends that charging the jury that the Commonwealth must prove he was "not incapable of knowing" was erroneous, that the proper phraseology under *M'Naghten* is that the Commonwealth must prove the actor was "able to know," and that this "variation" on *M'Naghten* "ingeniously shifted the burden to the defense to prove insanity" as the "Defendant must be 'able to understand' and not, 'not unable.'" Brief for Appellant at 39-40. We perceive little, if any, significance to the court's

use of the phrase "not incapable" as opposed to "able," and we are satisfied that the court's comprehensive instructions to the jury, read in their entirety (*see* Appendix), adequately and accurately conveyed to the jury the law in this Commonwealth regarding legal insanity/criminal responsibility under *M'Naghten,* notwithstanding appellant's quibbles with certain isolated portions of that charge.

Before we leave the subject of appellant's mental condition, we wish to make it clear that we are aware that appellant suffers and has suffered from a mental defect that contributed to his bizarre behavior both in the courtroom and on September 25, 1982, when thirteen innocent persons were murdered by his hand. His behavior was inexplicable, and his thought-processes remain difficult to comprehend. However, the incomprehensibility, the bizarreness of someone's behavior, is not, nor can it be, determinitive of his legal sanity or competency to stand trial. A hallmark of society is holding its members accountable for their conduct. In rejecting appellant Weinstein's request that we recognize irresistable impulses as diminishing an actor's ability to form the specific intent to kill, we stated in *Commonwealth v. Weinstein, supra* at 499 Pa. 116, 451 A.2d 1344:

> The law, in its effort to shape a rational social policy, grounded in the broadly shared assumptions of the individuals who make up society, cannot admit that acts an individual carefully plans and carries out to advance his own desire, when he knows those acts will result in the death of another human being, will not be punished simply because of the intensity or strangeness of that desire. Such an admission proceeds imperceptibly to the absurd result that the more

> strange and brutal the act the more likely the actor is to be relieved of its criminal consequences. Along the psychoanalytic continum the outrageous proves the innocence. In an oddly circular fashion the act establishes its cause as mental illness and the mental illness determines the act. Such analysis may be medically useful. It is not legally useful.

Appellant next contends that the court committed prejudicial error when it permitted the Commonwealth to introduce highly inflammatory photographs of the victims. As previously discussed, the court initially ruled at a suppression hearing on May 13, 1983, that the Commonwealth would not be permitted to introduce photographs of the murder victims. At this hearing, appellant explained to the court why he believed the photographs would be helpful to establish his conspiracy theory. The court cautioned appellant and advised him of the potential prejudice that could result if the photographs were introduced, and further advised him that the remaining photographs might become admissible at trial if he pursued his conspiracy theory. Appellant indicated, and the court found, that he understood the court's advice and the consequences of his tactics.

At trial, appellant did present his conspiracy defense and used some of the photographs of the victims in personally cross-examining Coroner Shavers. An extensive colloquy was conducted in which appellant was readvised of the consequences of his actions and, again, appellant demonstrated his understanding of the court's advice and of the consequences of his strategy. N.T. June 7-8, 1983, at 445-63.

In rebuttal, the Commonwealth recalled the three pathologists who had previously testified and introduced thirty-eight additional photographs of the corpses, over objection by defense counsel. The court gave a cautionary instruction to the jury concerning the photographs, explaining the limited purposes of the photographs and admonishing the jury not to "become emotional" and to "disregard any inflammatory influence that they may have upon you or that you may feel . . . ." N.T. June 18, 1983 at 1946.

Under these unusual circumstances, we see no error in admitting the photographs of the corpses to rebut appellant's defense of conspiracy. We recently stated in *Commonwealth v. Garcia,* 505 Pa. 304, 313, 479 A.2d 473 (1984):

> The admission into evidence of photographs depicting the corpse of the homicide victim or the location and scene of the crime lies within the sound discretion of the trial judge . . . . A photograph which is judged not inflammatory is admissible if "it is relevant and can assist the jury in understanding the facts." . . . A gruesome or potentially inflammatory photograph is admissible if it is of "such essential evidentiary value that [its] need clearly outweighs the likelihood of inflaming the minds and passions of the jurors." (Citations omitted.)

It is clear that the photographs of the crime victims in this case were of essential evidentiary value to refute appellant's conspiracy theory, and that the court did not err, therefore, in permitting the photographs to be introduced in rebuttal by the Commonwealth.

Appellant also asserts that the court erred in several instances in introducing evidence of his prior criminal record and of prior acts of violence which, he claims, unduly prejudiced him. It is, of course, true that evidence of prior crimes and/or acts of violence are inadmissible merely to show the defendant's propensity for violence or bad character. *Commonwealth v. Morris,* 493 Pa. 164, 175, 425 A.2d 715 (1981). However, evidence of prior crimes and violent acts may be admissible in special circumstances where it is relevant for some other legitimate purpose and not merely to show the defendant's propensity for committing crimes. *Commonwealth v. Claypool* 508 Pa. 198, 204, 495 A.2d 176 (1985).

Accordingly, the general rule prohibiting the admission of evidence of prior crimes nevertheless

> allows evidence of other crimes to be introduced to prove (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) to establish the identity of the person charged with the commission of the crime on trial, in other words, where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other.

Commonwealth v. Morris, supra at 493 Pa. 175, 425 A.2d 715. This list of "special circumstances" is not exclusive, and this Court has demonstrated it will recognize additional exceptions to the general rule where the probative value of the evidence outweighs the tendency to prejudice the jury. *Commonwealth v. Claypool, supra*

(evidence of defendant's prior criminal activity is admissible where defendant makes statement about such activity in order to threaten and intimidate victim and where force or threat of force is element of crime for which defendant is being prosecuted). Such evidentiary issues are addressed to the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Id.* With these principles to guide us, we review appellant's specific assignments of error.

Appellant contends that the court erred in permitting the Commonwealth to cross-examine Dr. DeWitt Weatherly regarding appellant's previous 1962 conviction and incarceration for armed robbery, assault with intent to kill and other related offenses. Dr. Weatherly testified for the defense regarding appellant's mental condition. As part of appellant's history which he narrated to the jury, Dr. Weatherly stated: "So he returned to the Wilkes-Barre area in January, 1961. He remained occupationally unsuccessful. Essentially, during the sixties, there were no jobs that one might characterize as fulltime, decent jobs." N.T. June 14, 1983 at 1320. In denying appellant's post-verdict motions, the lower court stated:

> The Commonwealth contends that the testimony of the doctor was false and misleading in that it gave the impression that during the 60's Banks [appellant] was making efforts to secure a full time decent job but he was occupationally unsuccessful. As noted in Bank's brief, "the fact of the matter was that [Banks] was incarcerated during the 1960s and defense did not want to bring this fact before the jury." To allow the jury to infer from the testimony that Banks was leading a normal life during this period would have been unfair to the Commonwealth. Allowing the

> Commonwealth to cross-examine as to the facts relied upon by the witness in forming his psychiatric opinion was certainly well within the discretion of the trial Judge. We are satisfied that the trial Court properly permitted the Commonwealth to elicit testimony of Bank's incarceration to rebut the impression that he was leading a normal life during the 60's. Certainly, the testimony was not elicited in any attempt to establish Banks' predisposition to commit the crimes charged or to impugn his character.

Slip op. at 10-11. The court instructed the jury at the time that this evidence was to be considered only for the "very limited purpose; that is, for the purpose of assisting you in determining the mental state of the defendant . . . on September 25, 1982 . . . ." and cautioned the jury that it was not to infer guilt in the instant case because of his prior record. N.T. June 14, 1983 at 1380. Similar instructions were repeated during the court's charge to the jury. N.T. June 21, 1983 at 2196. Under these circumstances, we agree with the lower court that the cross-examination of Dr. Weatherly concerning appellant's prior criminal record and incarceration was admissible for the limited purpose of assisting the jury in assessing the witness' credibility on a crucial and hotly contested issue.

The Commonwealth also elicited rebuttal testimony from the Director of the Domestic Violence Service Center regarding Regina Clemens, who had received shelter at the Center from September 4-7, 1982. The director testified that Ms. Clemens intended to reside with her brother when she left the Center, which contradicted appellant's own testimony that Ms. Clemens intended to return and live with him. This testimony was of essential evidentiary value to the Commonwealth in establishing appellant's

apparent motive for his rampage on September 15, 1982 and that he had the specific intent to kill. Thus, the court did not err in admitting this testimony even though, as appellant suggests, it contained the implication that Regina Clemens was a prior victim of appellant's violence which caused her to seek help at the shelter.

Similarly, the court did not err in allowing a neighbor to testify in its case-in-chief that he observed appellant slapping Susan Yuhas in the week preceding the murders and overheard him state "You're just like your sister Gina. You're going to leave just like her." This testimony supported the Commonwealth's motive theory, and the court did not err in allowing it to be introduced.[14]

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[14] In its opinion denying appellant's post-verdict motions, the court stated:

> We are satisfied that the testimony in question was relevant to the question of motive. It was one of a number of incidents indicating or establishing Banks' desire to secure and/or retain control over his family and his apparent lack of ability to do so. We reject Banks' contention that the claim of motive was conjectural and frail and failed to connect Banks' prior outburst of violent anger against Yuhas to the subsequent killings involved in this case. Such arguments go to the weight of the evidence and not to its admissibility. One cannot always expect to find logical or rational connections between incidents. Why someone would kill 13 people is not easily explained and where evidence, such as this, may well shed light on the reason or purpose and is so closely connected in time, it should not be rejected merely because of some potential prejudice to the Defendant. Considering the nature of the accusations in this case and the facts and circumstances presented, any weighing of the admission of this testimony on the scales of justice falls heavily on the side of the Commonwealth. Accordingly, we find no abuse of discretion in its admission. Slip op. at 9.

Appellant also asserts that the court erred in refusing his request for a mistrial when Detective William Maguire testified that appellant had stated to him he had "some dealings" with the Wilkes-Barre Police Department in the past.[15] N.T. June 9, 1983 at 775. This assertion is without merit. Detective Maguire's passing reference to "some dealings" that appellant may have had with the Wilkes-Barre police in the past did not necessarily or by reasonable implication infer that he had a prior criminal record with that police department, particularly given appellant's occupation as a prison guard at the state correctional institution at Camp Hill. *See Commonwealth v. Carpenter,* 511 Pa. 429, 515 A.2d 531 at 534-35 (1986) and cases cited therein.

Appellant challenges his twelve sentences of death imposed by the jury on several grounds.[16] Our standard of review of a judgment of sentence of death is established by the Sentencing Code, 42 Pa.C.S.A. § 9711(h), which provides:

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[15] Detective Maguire testified as to appellant's arrest and statements appellant had made at the police station. In the course of his direct testimony, he stated: "He made statements concerning the Wilkes-Barre Police. He said he thought the Wilkes-Barre Police was a nice police department; they weren't racists. He had some dealings with them in the past and . . . ." Defense counsel moved for a mistrial, which was denied. N.T. June 9, 1983 at 775.

[16] Appellant's final contention of trial error is that the court erred in denying his petition for exhumation of the victims' corpses. There is no merit to appellant's contention as the court acted well within its discretion in denying this petition. *See Commonwealth v. Kivlin,* 267 Pa.Super. 270, 406 A.2d 799 (1979), *allocatur denied* January 30, 1980.

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence.

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;

(ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or

(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

The evidence overwhelmingly supports the finding of an aggravating circumstance, since appellant was convicted on twelve counts of murder of the first degree committed at the time of the offenses in issue, each of which carried a sentence of either death or life imprisonment. 42 Pa.C.S.A. § 9711(d)(10). Appellant maintains, however, that the jury's sentencing verdict was against the weight of the evidence and abused its discretion in failing to give "due consideration" to the mitigating circumstances presented. This contention is patently without merit. "Under our legislative scheme, it is exclusively a jury question whether any mitigating factor is to be given determinitive weight when balanced with other mitigating

and aggravating circumstances . . . ." *Commonwealth v. Fahy,* 512 Pa. 298, 317, 516 A.2d 689 (1986). The jury performed its exclusive function and acted well within the authority placed upon it by the legislature in determining that the overwhelming evidence regarding the aggravating circumstance before it outweighed the mitigating circumstances it found.

Appellant asserts that the prosecutor made improper remarks during closing arguments at the sentencing phase which require that we vacate the sentences of death and remand for the imposition of life sentences. These remarks were: an incorrect suggestion that the *M'Naghten* standard was applicable in determining appellant's mental illness as a mitigating circumstance, which suggestion was objected to and corrected by the trial court; and a remark, made in response to closing remarks of defense counsel, that appellant "did it by showing no sympathy or mercy to his victims, and I ask that you show him no sympathy, that you show him no mercy." N.T. June 21, 1983 at 2311. The latter remark was also objected to, with the objection sustained by the trial court. The prosecutor's misstatement regarding appellant's mental condition and emotional state in consideration of mitigating circumstances was promptly corrected and the jury was accurately charged by the trial court, and appellant was not prejudiced thereby. The prosecutor's remarks regarding no mercy or sympathy were within the oratorical license and impassioned argument that this Court has consistently allowed during the sentencing phase, particularly where prompted by remarks of defense counsel. *See Commonwealth v. Whitney,* 511 Pa. 232, 512 A.2d 1152 (1986), and cases cited therein. Accordingly, we find no basis in the prosecutor's closing arguments for disturbing the jury's

sentences of death, nor do we find those sentences to have been otherwise "the product of passion, prejudice or any other arbitrary factor."

The final argument advanced by appellant is that the death penalty constitutes cruel and unusual punishment in this case "as it befalls upon an individual, who, at the time of commission of the crime, was severely mentally ill." Brief for Appellant at 56. We do not agree. Sufficient evidence of record established that appellant was legally sane when he committed the mass slayings and competent to stand trial, and we see no reason why the jury's finding that he had acted under extreme mental or emotional disturbance would render imposition of the death penalty cruel and unusual punishment. This Court recently addressed a similar argument in *Commonwealth v. Fahy, supra,* 512 Pa. at 316-317, 516 A.2d 689, wherein we stated:

> After oral argument, permission was given and supplemental briefs were filed by both parties concerning an inquiry made by this Court during oral argument. The issue underlying this inquiry is whether a finding by the jury in mitigation under 42 Pa.C.S. § 9711(e)(3) – substantial impairment – precludes imposition of the death penalty, notwithstanding the jury's determination that the three aggravating circumstances present outweighed the two factors found in mitigation. We conclude that it does not.
>
> Our review of the death penalty statute, the record and the nature of the common law bar to execution of the death warrant where the condemned prisoner becomes incompetent after conviction convinces us that a jury finding of substantial mental impairment under § 9711(e)(3)

> does not bar the death penalty imposed by the jury, and that the common law rule has no application here since Appellant is not incompetent.
>
> Appellant was ruled competent to stand trial and for sentencing, and there is nothing in the record to suggest that Appellant is incompetent and should not be executed . . . . Under our legislative scheme, it is exclusively a jury question whether any mitigating factor is to be given determinative weight when balanced with other mitigating and aggravating circumstances in the case. Our legislature could have provided that a finding of substantial impairment precludes imposition of the death sentence, however, it did not do so. Instead, it determined that this factor was to be weighed by the jury along with all the other factors and that it is within the province of the jury to determine how much weight it should be accorded. We find no basis upon which to disturb the verdict and sentence of the jury.

Lastly, we are required to review the penalties imposed in "similar cases" to determine whether the sentence of death is excessive or disproportionate to those imposed in such similar cases. Frankly, we have found no "similar cases" to this, a multiple homicide where appellant coldly massacered thirteen people, including the women and children of his extended family. Nevertheless, we have reviewed other cases wherein the jury has found the same aggravating circumstance found by the jury in the instant

case, and find no excessiveness or disproportionality to the sentences imposed in such other cases.[17]

For the foregoing reasons, we affirm the appellant's convictions and his judgments of sentence.[18]

McDERMOTT, J., concurs in the result.

NIX, C.J., filed a dissenting opinion in which ZAPPALA, J., joined.

NIX, Chief Justice, dissenting.

Although I have serious problems with the trial court's determination that the appellant had the mental competence to stand trial, my dissent from the majority opinion is based on another ground. In my view the trial court, by allowing appellant to put before the jury the gruesome photographs of the infant victims' bullet-torn bodies, permitted him to convert the system of criminal justice into an instrument for his self-destruction.

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[17] We have reviewed the data and information pertaining to similar cases that has been compiled by the Administrative Office of Pennsylvania Courts pursuant to this Court's directive in *Commonwealth v. Frey*, 504 Pa. 428, 475 A.2d 700, 707-08 (1984), *cert. denied* 469 U.S. 963, 105 S.Ct. 360, 83 L.Ed.2d 296 (1984).

[18] The prothonotary of the Eastern District is hereby directed to transmit a full and complete copy of all of the records and transcripts of the trial, sentencing and appeal of this case to the Governor, as required by 42 Pa.C.S.A. § 9711(i). Transmittal of this record to the Governor does not, however, "remove the case from the jurisdiction of the courts or prevent further action by the courts." *Commonwealth v. Travaglia*, 502 Pa. 474, 505-06 n. 5, 467 A.2d 288 (1983), *cert. denied*, 467 U.S. 1256, 104 S.Ct. 3547, 82 L.Ed.2d 850 (1984).

The appellant's court-appointed lawyers had advised him not to take the witness stand; yet, he elected to disregard their advice. Although the appellant had every right to give testimony in his own behalf, he went beyond that. The appellant took it upon himself to introduce in evidence, for the purpose of trying to establish a preposterous theory of a conspiracy against him, photographs of the dead victims. Those pictures were so horrible and evocative, so inflammatory in their nature, that the trial court had previously ruled them inadmissible. The judgment as to which exhibits will be introduced into evidence is a function to be performed by a competent trial counsel. *See Commonwealth v. Bell*, 442 Pa. 566, 276 A.2d 834 (1971). The conclusion is therefore inescapable that when the appellant on his own, over the strenuous opposition of his counsel, put the photographs before the jury, he was acting as his own attorney and was representing himself. He had, at that point, superseded appointed trial counsel as to the stewardship of the case.

It is true that the United States Supreme Court, in *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), held that a criminal defendant has a constitutional right to represent himself. The Court, however, cautioned that, "[a]lthough a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that *'he knows what he was doing* and his choice is made with eyes open.'" *Id.* at 835, 95 S.Ct. at 2541 (emphasis added). The Court also observed that a defendant's right to act as his own lawyer was not a license to abuse

the dignity of the judicial process. *Id.* at 834 n. 46, 95 S.Ct. at 2541 n. 46.

The record in the instant case clearly portrays the appellant as a person suffering from a severe mental disorder, if not at the time of the crime itself, then certainly during the trial. The truth of that conclusion is made even more compelling by the absurdity of his conspiracy theory and his proposal to establish it with exhibits which could do nothing but prejudice his case. Despite the trial court's finding that the appellant was competent to stand trial, his paranoiac utterances and ramblings before the judge should have left no doubt in the mind of the court as to his inability to undertake any part of his representation.[1]

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[1] Prior to appellant's taking the witness stand and introducing the photographs, a colloquy took place between him and the trial judge. During that exchange the appellant made remarks such as: "I can show that there is a conspiracy against me. I can prove it with material fact, right here in this courtroom today . . . . This is the only shot I got to pull the mask off the face of the Devil, and I intend to do it . . . . I sat up here, sir, for eight days and listened to nothing but hypocrisy, lies and corruption and coerced and perjured testimony. I don't see where I can hurt myself . . . . I don't have a chance anywhere in this nation . . . this trial is a farce . . . . I've been bullied enough." Following the last remark, the trial judge stated that he would not tolerate "testimony" of that kind. T.T. 1639-1642.

In response to the court's rebuke the appellant replied: "Well, then, I'll take my best shot and go with what I got. Can I get *my* photographs and stuff?" The judge answered, "you certainly may." T.T. 1642. At that point, defense counsel asked the court to determine again the appellant's mental competency, stressing the utter absurdity of the conspiracy theory. The trial judge denied the motion, and in doing so said: "It *may well be that he believes that. It may well be, as they say, part of his delusion.* If that is so, it doesn't seem to me *you're* hurt." T.T. 1643. This

(Continued on following page)

Other jurisdictions have considered the issue of the power or even the duty of a trial judge to prevent a criminal defendant from representing himself in certain circumstances. For example, in *People v. Burson,* 11 Ill.2d 360, 143 N.E.2d 239 (1957), the Supreme Court of Illinois was confronted with the problem of self-representation by a defendant whose sanity was seriously in doubt. The Court concluded that even if the defendant was sane at the time of trial, his right to represent himself was subject to the constant duty of the court to protect the judicial process from inadequate and improper conduct of the defense. The Court further held that such a duty included the broad discretion to supersede the defendant's conduct of his own defense.

Along similar lines was the thinking of the Supreme Court of Washington in the case of *State v. Kolocotronis,* 73 Wash.2d 92, 436 P.2d 774 (1968). There, that Court stated the following: "Even though a defendant demands his constitutional right to act as his own counsel, if the court determines that he does not have . . . adequate mental competency to act as his own counsel, then his right to a fair trial and his constitutional right to due process of law, [are] disregarded if the court permits him to so act in a criminal case." *Id.* at 97-100, 436 P.2d at 779-80.

As I read the record in this case the trial court, in allowing the appellant to introduce the photographic exhibits, gave no consideration to his questionable mental state at the time. Even assuming the validity of the initial

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last statement addressed the concern of defense counsel that the conspiracy theory would make *them* "look like a bunch of monkeys."

judgment of the court that appellant was competent to stand trial, that judgment did not relieve the court of the responsibility of assuring that the proceedings were in accordance with a fair trial. Moreover, the United States Supreme Court in *Westbrook v. Arizona,* 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966), in a unanimous per curiam opinion stated:

> Although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense. 'The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused – whose life or liberty is at stake – is without counsel. This *protecting duty* imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.' *Johnson v. Zerbst,* 304 US 458, 465 [58 S.Ct. 1019, 1023, 82 L.Ed. 1461]; *Carnley v. Cochran,* 369 US 506 [82 S.Ct. 884, 8 L.Ed.2d 70].

Id. at 150, 86 S.Ct. at 1320 (emphasis added).

Although counsel for the defense were physically present, the court permitted Banks to waive the assistance of counsel when appellant was permitted to introduce this evidence and to make these highly prejudicial comments over the strenuous objection of both defense counsel. Such an action in my judgment constitutes a waiver of counsel without the court's exercising its "protecting duty."

For the reasons set forth herein, I am constrained to conclude that the trial judge, in allowing the defendant to introduce the prejudicially inflammatory pictures, did not perform his constitutional protecting duty of attempting to ensure that the waiver of counsel was intelligently and knowingly made. As a consequence, this record reflects that a mockery was made of justice.

This action is justified by the Commonwealth by suggesting that this bizarre conduct was merely a strategem by Banks to convince the jury he was insane. It is quite true that one can feign insanity by acting in a bizarre manner. However, it is equally true that one mentally disturbed is quite likely to act in a bizarre manner. The court should have sought expert medical assistance in determining in this instance which was the case. Such a request was made by defense counsel and refused by the court.

As former Chief Justice Burger observed in his dissenting opinion in *Faretta v. California,* the trial judge is "charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial." 422 U.S. at 839, 95 S.Ct. at 2543. That goal, according to Chief Justice Burger, "is ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel." *Id.* Going further, Chief Justice Burger said, "[t]he damage thus inflicted is not mitigated by the lame explanation that the defendant simply availed himself of the 'freedom to go to jail under his own banner.'" *Id.*

I therefore dissent and would vacate the judgments of sentence.

ZAPPALA, J., joins this dissenting opinion.

[Appendix Omitted]

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656 A.2d 467

Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee,
v.
George BANKS, Appellant.

Submitted Nov. 1, 1994.
Decided March 27, 1995.

Albert J. Flora, Wilkes-Barre, for Banks.

Peter Paul Olszewski, Scott C. Gartley, Wilkes-Barre, Robert A. Graci, Chief Deputy Atty. Gen., for Com.

Before NIX, C.J., and FLAHERTY, ZAPPALA, CAPPY, CASTILLE and MONTEMURO, JJ.

OPINION

CAPPY, Justice.

This is a direct appeal from an Order of the trial court denying post-conviction relief in a death penalty case.[1] For the following reasons, we affirm the Order of the trial court.

On June 22, 1983, Appellant, George Banks, was convicted by a jury of twelve counts of murder of the first degree. He was also convicted of one count of murder of the third degree, attempted murder, aggravated assault, recklessly endangering another person, robbery and theft

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[1] 42 Pa.C.S. § 9546(d) provides that a final order disposing of a defendant's post-conviction petition shall be directly appealable to this Court in a death penalty case. *See also,* 42 Pa.C.S. § 722.

of a motor vehicle.[2] Following a penalty hearing, appellant was sentenced to death on each of the twelve counts of first degree murder.[3] On direct appeal, this Court affirmed the convictions and judgments of sentence. *Commonwealth v. Banks,* 513 Pa. 318, 521 A.2d 1 (1987), *cert. denied*, 484 U.S. 873, 108 S.Ct. 211, 98 L.Ed.2d 162 (1987). In February, 1989, appellant filed the instant petition for post-conviction relief. The trial court denied that collateral relief petition on September 8, 1993.[4]

To be eligible for PCRA relief, Appellant must establish, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the enumerated errors or defects found in section 9543(a)(2) and that his issues have not been previously

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[2] During the early morning of September 25, 1982, Appellant shot fourteen (14) people with a Colt AR-15 semi-automatic rifle, killing thirteen (13) and wounding one. The entire rampage lasted no more than one hour. The majority of the victims were women with whom appellant had been involved as well as the children borne of those relationships. A more detailed account of the facts surrounding appellant's convictions is set forth in this Court's decision on direct appeal from the judgments of sentence of death. *See Commonwealth v. Banks,* 513 Pa. 318, 521 A.2d 1 (1987).

[3] In addition to the twelve sentences of death, Appellant was sentenced to consecutive terms of ten to twenty years for the third degree murder conviction, five to ten years for the attempted murder conviction and ten to twenty for the robbery conviction.

[4] Although Appellant purportedly filed his petition under the Post Conviction Hearing Act ("PCHA"), we note that the same was filed after the effective date of the new Post Conviction Relief Act ("PCRA"). As such, Appellant's collateral relief petition must be reviewed under the standards set forth in the PCRA and not those of PCHA. 42 Pa.C.S. § 9542.

litigated.[5] An issue is deemed finally litigated for purposes of the PCRA if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue." 42 Pa.C.S. § 9544(a)(2). If

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[5] Section 9543 of the PCRA provides, in pertinent part:

(a) General rule. – To be eligible for relief under this subchapter, a person must plead and prove by a preponderance of the evidence all of the following:

(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of Pennsylvania or laws of this Commonwealth or the Constitution of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused an individual to plead guilty.

(iv) The improper obstruction by Commonwealth officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

(v) A violation of the provisions of the Constitution, law or treaties of the United States which would require the granting of Federal habeas corpus relief to a State prisoner.

(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and that would have affected the outcome of the trial if it had been introduced.

(vii) The imposition of a sentence greater than the lawful maximum.

(viii) A proceeding in a tribunal without jurisdiction.

the allegations of error have not been finally litigated, Appellant must also demonstrate that those allegations of error have not been waived or that, if waived, either the conditions listed in section 9543(a)(3)(ii) or (iii) are met.[6] 42 Pa.C.S. § 9543(a)(3). An issue is deemed waived "if the petitioner failed to raise it and if it could have been raised before the trial, at the trial, [or] on appeal . . . " 42 Pa.C.S. § 9544(b). Finally, Appellant must demonstrate that the failure to litigate the issue prior to, or during trial, or on direct appeal could not have resulted from any reasonable tactical decision of counsel. 42 Pa.C.S. § 9543(a)(4).[7]

Appellant first contends that the jury instructions, jury poll and the verdict slip employed during the penalty phase suggested to the jury that its findings as to

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[6] Section 9543(a)(3) provides:

That the allegation of error has not been previously litigated and one of the following applies:

(i) The allegation of error has not been waived;

(ii) If the allegation of error has been waived, the alleged error has resulted in the conviction or affirmance of sentence of an innocent individual.

(iii) If the allegation of error has been waived, the waiver of the allegation of error during pretrial, trial, post-trial or direct appeal proceedings does not constitute a State procedural default barring Federal habeas corpus relief.

[7] The Commonwealth contends that all of the issues raised in Appellant's post-conviction petition are waived for failure to raise those issues on direct appeal. While we agree that some of the issues presented could have been raised on direct appeal and thus, could be deemed waived under the PCRA, we will nevertheless address all of Appellant's claims since the trial court addressed all of those claims and since it is this Court's practice to address all issues arising in a death penalty case irrespective of a finding of waiver. *Commonwealth v. DeHart,* 539 Pa. 5, 650 A.2d 38 (1994).

mitigating circumstances must be unanimous and as such violated the United States Supreme Court's mandate in *Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). Appellant argues further that in order to comply with *Mills,* a trial court should be required to specifically instruct the jury that unanimity is not required as to findings of mitigating circumstances. Both of these contentions are without merit.

In *Mills,* the United States Supreme Court vacated the sentence of death and remanded for further proceedings, finding that the jury instructions and the verdict slip employed during the penalty phase of Mills' trial created a substantial risk that the jurors would be misled to believe that unless each of them agreed as to the existence of a particular mitigating circumstance, that mitigating circumstance could not be considered in rendering its sentence. In so holding, the Court in *Mills* emphasized that the sentencer must be permitted to consider all mitigating evidence. *Id.* at 384, 108 S.Ct. at 1870, 100 L.Ed.2d at 400. Neither the jury instructions, the jury poll nor the verdict slips in the instant matter contained language which would violate the dictates of *Mills.*

During the penalty phase of the trial, the trial court instructed the jury as follows:

> The sentence you impose will depend upon your findings concerning aggravating and mitigating circumstances. The Crime[s] Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which

outweigh any mitigating circumstance or circumstances.

The verdict must be a sentence of life imprisonment in all other cases.

(N.T. June 20, 1983, Vol. VI, p. 2315). This instruction, which mirrors the language found in the death penalty statute of our Sentencing Code, has previously been reviewed by this Court and determined not to violate *Mills. Commonwealth v. Hackett,* 534 Pa. 210, 627 A.2d 719 (1993); *Commonwealth v. Marshall,* 534 Pa. 488, 633 A.2d 1100 (1993); *Commonwealth v. O'Shea,* 523 Pa. 384, 567 A.2d 1023 (1989), *cert. denied,* 498 U.S. 881, 111 S.Ct. 225, 112 L.Ed.2d 180 (1990). Accordingly, appellant's claim with respect to the instruction is without merit.

Similarly, Appellant's claim with respect to the verdict slips is also without merit. The form of verdict slip employed in the instant matter was virtually identical to that considered by this Court in *Commonwealth v. Frey,* 520 Pa. 338, 554 A.2d 27 (1989), *cert. denied,* 494 U.S. 1038, 110 S.Ct. 1500, 108 L.Ed.2d 635 (1990), and determined not to infer to the jury a requirement of unanimity with respect to mitigating circumstances. As such, Appellant's claim that the verdict slip form submitted to the jury in the instant matter impermissibly suggested to the jury that it must find mitigating circumstances by unanimous vote is unfounded.

Nor do the answers provided by the individual jurors during the poll suggest in any manner that they believed unanimity was required in finding mitigating circumstances. In response to defense counsel's request for a jury poll, the trial court in the instant matter stated as follows:

Ladies and gentlemen, counsel has asked for a poll. You will recall that simply means you will be called upon to rise and respond whether your verdict was, in each of the twelve cases, life or death.

The Foreman has indicated, as has been publicly read, that the decision of death was based upon your finding one or more aggravating circumstances which outweighs any mitigating circumstance. He further indicated that the aggravating circumstance was No. 3; the mitigating circumstance was No. 1.

I will call upon each of you individually. I will ask you to rise and indicate whether your verdict in each case, what it was, and whether or not you agreed with the statement made by the Foreman that you found one aggravating circumstance as noted, one mitigating circumstance as noted, and that the aggravating circumstance outweighed the mitigating.

(N.T. p. 2332). The trial court then asked Juror No. 1 what her verdict was with respect to the first of the twelve death penalty convictions to which she responded "Death." In response to the court's further questions, Juror No. 1 responded that her verdict was based on her finding of one or more aggravating circumstances that outweighed any mitigating circumstances; that the aggravating circumstance found by her was "No. 3," (referring to the sequential order of those circumstances as listed on the actual verdict slips); and that she found mitigating circumstance

"No. 1."[8] The trial court then proceeded to ask Juror No. 1 what her sentence was with respect to each of the remaining eleven death penalty cases to which she responded "death" and whether her sentence of death thereon was based upon the same criteria as the first matter to which she responded in the affirmative. The trial court then polled the remaining jurors, asking each of them whether their sentence of death was based on the same criteria. It appears to be Appellant's contention that since the jurors were not specifically polled on each mitigating circumstance presented but not checked on the verdict slip, an inference may be drawn that the jurors were impermissibly prohibited from considering all relevant mitigating factors. We do not agree. Appellant cites this Court's decision in *Commonwealth v. Young,* 524 Pa. 373, 572 A.2d 1217 (1990), in support of his position. *Young*, however, is distinguishable.

In *Young*, the verdict sheet contained explicit instructions that the mitigating circumstances be unanimously found and, upon questioning from the trial court, the foreman therein stated that the jury had "unanimously" found two particular mitigating circumstances but had not come to any conclusion with respect to a third mitigating

[8] The particular aggravating circumstance was 42 Pa.C.S. § 9711(d)(10), the defendant has been convicted of another Federal or State offense committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense. The particular mitigating circumstance referred to by Juror No. 1 was 42 Pa.C.S. § 9711(e)(2), the defendant was under the influence of extreme mental or emotional disturbance.

circumstance. This Court there held that although a proper jury instruction had been given by the trial judge, the incorrect verdict sheet together with the jury foreman's response demanded that the matter be remanded for resentencing since it could not be determined whether the jury disregarded the proper instructions as a result of the improper verdict sheet. In the instant matter, the jury was never provided with either an incorrect instruction or incorrect verdict slip. As discussed above, both the verbal instructions given by the court as well as the instructions printed on the verdict slips were correct and not impermissibly suggestive of a unanimity requirement with respect to mitigating circumstances. Nor is there anything in the trial court's questions nor the jurors' responses during the polling that would indicate that they believed they had to find mitigating circumstances unanimously. In sum, neither the instructions of the court nor the printed instructions on the verdict slips nor the questions and responses of the court and jury during polling, standing alone or viewed in total, infer a requirement of unanimity which would violate the dictates of *Mills*.

Moreover, we do not agree with Appellant that a specific charge explicitly informing the jury that it need not find mitigating circumstances by unanimous vote is required. Our decision in *Commonwealth v. Hackett, supra,* 534 Pa. 210, 627 A.2d 719, *makes clear that so long as proper instructions are given by the trial court, there is no requirement that the court specifically charge the jury*

that it need not be unanimous in finding mitigating circumstances. Hackett, *534 Pa. at 222-223, 627 A.2d at 725.*[9]

Accordingly, for all these reasons, Appellant's claim that his sentencing procedures violated *Mills* was properly denied by the PCRA court.

Appellant next contends that the sentencing procedures in effect at the time of his sentencing were ambiguous and not uniformly applied in Pennsylvania, and thus violative of the Eighth and Fourteenth Amendments of the United States Constitution. Appellant premises his argument on a report of the Pennsylvania Criminal Procedural Rules Committee which allegedly delineated several procedural flaws with respect to the death penalty together with the fact that subsequent to his sentencing, Rule 358A of the Pennsylvania Rules of Criminal Procedure was adopted. Appellant seems to contend that the adoption of Rule 358A, although occurring after the imposition of his sentences, somehow evinces that the procedures in place at the time he was sentenced were constitutionally deficient.[10]

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[9] Appellant seems to imply that the adoption of Pa.R.Crim.P. 358A, which became effective July 1, 1989, evinces the impropriety of not specifically instructing the jury on the issue of unanimity as to mitigating circumstances. As this Court recently noted in *Commonwealth v. Tilley*, 528 Pa. 125, 143 n. 11, 595 A.2d 575, 583 n. 11 (1991), the purpose of Rule 358A is simply to provide statewide uniform sentencing verdict slips in death penalty cases and in no way suggests that the prior procedures employed in Pennsylvania were improper.

[10] Appellant contends that the PCRA court failed to address this issue thereby hampering our appellate review of the issue. The Commonwealth submits, however, that the issue was addressed by the PCRA court exactly in the manner in which Appellant raised and

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While Appellant sets forth five specific alleged deficiencies, he fails to argue that any one or more of those alleged deficiencies actually occurred in his case. Instead, he seems to simply be arguing that because the Criminal Procedure Rules Committee believed these issues to be worthy of concern, then *any* death penalty sentence imposed prior to the amendments in 1989 is not constitutionally sound. This argument is ludicrous. Section 9543(a)(2) of the PCRA clearly provides that in order to obtain post-conviction relief, a defendant is required to plead and prove that his conviction or sentence resulted from one or more of the errors or defects enumerated in the Act. Clearly, Appellant has not met this burden. Moreover, as noted in footnote 6, *supra*, this Court in *Commonwealth v. Tilley* noted that the adoption of Rule 358A of the Rules of Criminal Procedure does not suggest the procedure employed prior thereto was constitutionally deficient. Finally, the fact that the Rules Committee may have determined that supplemental rules needed to be implemented, does not, alone, establish that the prior rules and procedures were unconstitutional. Accordingly, Appellant was properly denied post-conviction relief on this issue.

Appellant next contends that he was denied due process of the law by the trial court's alleged failure to

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briefed the same below. In pertinent part, the court below concluded that the adoption of Rule 358A did not render the procedures employed prior thereto improper. Even assuming the court did not address Appellant's precise argument, our review thereof is not affected insofar as his claim relates solely to an issue of law and not one dependent upon missing facts as Appellant seems to suggest.

follow Pa. R.Crim.P. 1507 and 1508.[11] More specifically, Appellant argues that the trial court never gave the

[11] Rule 1507 provides:

(a) The judge shall promptly review the motion, any answer by the attorney for the Commonwealth, and other matters of record relating to the defendant's claim(s). If the judge is satisfied from this review that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings, the judge shall give notice to the parties of the intention to dismiss the motion and shall state in the notice the reasons for the dismissal. The defendant may respond to the proposed dismissal within 10 days of the date of the notice. The judge thereafter shall either order the motion dismissed, or grant leave to file an amended motion, or direct that the proceedings continue.

(b) A motion for post-conviction collateral relief may be granted without a hearing when the motion and answer show that there is no genuine issue concerning any material fact and that the defendant is entitled to relief as a matter of law.

(c) The judge may dispose of only part of a motion without a hearing by ordering dismissal of or granting relief on only some of the issues raised, while ordering a hearing on other issues.

(d) When the motion is dismissed without a hearing, the judge:

(1) shall issue an order to that effect and shall state in the order the grounds on which the case was determined; and

(2) shall advise the defendant by certified mail, return receipt requested, of the right to appeal from the final order disposing of the motion and of the time within which the appeal must be taken.

Rule 1508 provides:

(a) Except as provided in Rule 1507, the judge shall order a hearing on all material issues of fact raised by the motion and answer, if any. The judge may deny a hearing on a

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requisite notice of its intent to dismiss the petition nor did it afford Appellant an opportunity to respond to the court's apparent intent to dismiss. Appellant's contention is, again, unfounded.

The clear intent behind Rules 1507 and 1508 was to assure that an evidentiary hearing be held on a

specific issue of fact when a full and fair evidentiary hearing upon that issue was held at trial or at any proceeding before or after trial. The judge shall schedule the hearing for a time that will afford the parties a reasonable opportunity for investigation and preparation, and shall enter such interim orders as may be necessary in the interests of justice.

(b) The judge, on motion or request, shall postpone or continue a hearing to provide either party a reasonable opportunity, if one did not exist previously, for investigation and preparation regarding any new issue of fact raised in an amended motion or amended answer.

(c) The judge shall permit the defendant to appear in person at the hearing and shall provide the defendant an opportunity to have counsel.

(d) Upon the conclusion of the hearing the judge shall:

(1) determine all material issues raised by the motion, if any;

(2) issue an order denying relief or granting a specific form of relief and stating the grounds on which the case was determined, and issue any supplementary orders appropriate to the proper disposition of the case; and

(3) state on the record, or issue and serve upon the parties, findings of fact and conclusions of law on all material issues.

(e) If the judge disposes of the case in open court at the conclusion of the hearing, the judge shall advise the defendant on the record of the right to appeal from the final order disposing of the motion and of the time within which the appeal must be taken. If the case is taken under advisement, the judge shall advise the defendant of the right to appeal by certified mail, return receipt requested.

post-conviction petition where there are factual issues to be resolved. Where, however, the issues raised in a petition involve no disputed factual issues, a hearing thereon is clearly not necessary and a resolution thereof without such a hearing does not violate the rules. Further, under Rule 1507(a), notice of a court's intention to dismiss is required only where the trial court, after review of the petition, any answer by the Commonwealth thereto, and any other matters of record, determines that a hearing is not necessary, that the petitioner is not entitled to post-conviction relief *and that no further proceedings are necessary.* Unequivocally, the purpose of such notice is to afford the petitioner an opportunity to respond as to why dismissal would be inappropriate. Here, however, the trial court, upon review of the petition and answer thereto, was not required to provide notice as it simply was not its intention to then dismiss the petition. While it is true that the trial court did not hold an evidentiary hearing on this matter, it appears that both Appellant and the Commonwealth agreed that the issues presented involved no factual disputes but only issues of law.[12] Appellant does not dispute that he had notice of the trial court's intention *not* to hold an evidentiary hearing. Surely, had he disagreed with the court's conclusion in this respect, he would have responded in an appropriate manner. Indeed, no where

[12] By Order dated December 4, 1992, the trial court scheduled oral argument on the petition, noting that it found that the petition raised no material issues of fact. It appears from the record that briefs by both Appellant and the Commonwealth had been filed prior to the date of this Order. It also appears, that following the entry of this December 4, 1992 Order, the parties agreed to submit the issues on briefs rather than proceed to oral argument.

does he argue that there are issues of fact that must be determined. In sum, the trial court's manner of disposition of Appellant's Post-Conviction Petition did not violate Rules 1507 and 1508.

Next, Appellant contends that our proportionality review as provided for in 42 Pa.C.S. § 9711(h)(3)(iii) and as conducted pursuant to this Court's decision in *Commonwealth v. Frey,* 504 Pa. 428, 475 A.2d 700 (1984), *cert. denied* 469 U.S. 963, 105 S.Ct. 360, 83 L.Ed.2d 296 (1984), denied him procedural due process under the Fourteenth Amendment to the United States Constitution. It is Appellant's contention that because a defendant is not provided any opportunity to contest the accuracy of the information being gathered by the Administrative Office of Pennsylvania Courts ("AOPC") and relied upon by this Court in carrying out its statutorily mandated proportionality review, he is denied due process. This due process claim is premised upon Appellant's argument that because the proportionality review impacts upon sentencing, it is a critical stage of the criminal proceedings to which due process rights of confrontation and cross-examination attach. Appellant's claim is without merit for several reasons.

First, as the trial court accurately noted, proportionality review is not an adversarial part of the trial or sentencing procedures in a death penalty case. Indeed, it is not even a sentencing proceeding at all. Rather, it is an appellate process designed to assure that a sentence of death imposed in a particular case is not disproportionate to the penalty imposed in similar cases. Moreover, a similar claim has previously been rejected by this Court in *Commonwealth v. DeHart,* 512 Pa. 235, 516 A.2d 656 (1986), *cert. denied,* 483 U.S. 1010, 107 S.Ct. 3241, 97 L.Ed.2d 746

(1987), *remanded on other grounds,* 539 Pa. 5, 650 A.2d 38 (1994). There, we stated:

> Appellant next argues that the death penalty statute is defective in that it provides the defense with no funds or administrative assistance to determine if the proportionality review required pursuant to 42 Pa.C.S. § 9711(h)(3)(iii) is adequately performed. Appellant's concern with the manner in which this Court reviews the proportionality of sentences in capital cases is unwarranted. In *Commonwealth v. Frey,* 504 Pa. 428, 475 A.2d 700, *cert. denied*, 469 U.S. 963, 105 S.Ct. 360, 83 L.Ed.2d 296 (1984), we ordered the performance of an ongoing comprehensive study of all cases in which the defendant was convicted of first degree murder since the effective date of the present death penalty statute. For each such case, information has been compiled concerning the age, race and sex of the defendant and the victim, whether the death penalty was sought, the aggravating and mitigating circumstances presented and the evidence relating thereto, the sentence imposed, related charges and the disposition thereof, and data concerning any co-defendants. This study entitled "Pennsylvania Death Penalty Study," is maintained by the Administrative Office of Pennsylvania Courts and is made available by that office free of charge. Thus there is no barrier to access to the information upon which this Court bases its decision as to proportionality. Absent some definitive criticism of the adequacy and/or the accuracy of the information supplied by this source, the instant argument is without merit.

Id. 512 Pa. at 259-260, 516 A.2d at 669. Appellant, similar to the defendant in *DeHart,* has failed to point to

any actual deficiencies and/or inaccuracies in the relevant information supplied by the AOPC. Moreover, Appellant makes no claim that he requested and was denied access to the information compiled by the AOPC or that he was in any manner precluded from conducting his own investigation as to the accuracy of that information. As such, Appellant is not entitled to post-conviction relief as to this issue.

Finally, Appellant contends that the trial court abused its discretion in permitting Appellant to testify and cross-examine certain witnesses and thereby denied Appellant effective assistance of counsel. While somewhat convoluted, the crux of Appellant's argument is that the trial court erred in permitting him to assist in his own defense.

During the guilt phase of trial, counsel for Appellant informed the court that Appellant wished to testify against the advice of counsel. Accordingly, the trial court conducted an extensive colloquy explaining in great detail the rights Appellant would be foregoing if he testified and most importantly, the prejudicial effect his own admission of evidence may have on his case. During the colloquy it was clear that Appellant wished to present his theory of conspiracy[13] and that in so doing he intended to introduce photographs of some of the corpses thereby opening the

[13] As this Court noted in our opinion on direct appeal in this matter, Appellant believed that the police officers, the Mayor of Wilkes-Barre, the District Attorney's office and perhaps the court were conspiring against him by concealing and altering evidence, shooting some of the victims, rearranging some of the corpses and covering up some of their wounds, and obstructing Appellant's attempts to expose the "conspiracy." *See Commonwealth v. Banks,* 513 Pa. at 336, 521 A.2d at 10.

door for the Commonwealth to introduce additional photographs previously deemed to be inadmissible as too prejudicial.[14] The trial court explained to Appellant that it previously ruled similar photographs inadmissible so as to prevent Appellant from being prejudiced thereby and that if Appellant, himself, chose to admit photographs of the victims, he would likely suffer prejudice as a result thereof. Appellant indicated his clear understanding of the trial court's instructions as well as the consequences of his acknowledged strategy. Accordingly, the trial court permitted him to testify. Appellant now contends that the trial court's ruling was in error and that the effect of that ruling was to deprive his counsel of actual control over the proceedings and thus, deny him "his right to effective assistance of counsel." (Brief of Appellant, p. 24). While disguised as a claim of ineffectiveness, we discern no such claim in Appellant's argument.[15] No where does Appellant contend that his trial counsel were ineffective; rather he argues that the trial court, by its ruling, denied him effective assistance of counsel. In essence, what Appellant here argues is that the admission of the gruesome photographs and the cross-examination of witnesses during which Appellant used some of those photographs was so prejudicial that the court should not have permitted same, irrespective of Appellant's unwavering insistence on

[14] During a pre-trial suppression hearing, the trial court ruled that the Commonwealth would not be permitted to introduce photographs of the corpses.

[15] At page 22 of his brief, Appellant complains that the trial court incorrectly addressed a "competency" claim rather than an ineffective assistance of counsel claim.

admitting those photographs and cross-examining those witnesses.

The issue of the admission of the photographs was raised by Appellant on direct appeal and addressed by this Court in its prior opinion in this matter. *Commonwealth v. Banks,* 513 Pa. at 348-349, 521 A.2d at 16-17. As such, that issue has been finally litigated and Appellant is not entitled to PCRA relief thereon. 42 Pa.C.S. § 9544(a)(2). However, again, given the serious nature of the matters before us, we will proceed to address Appellant's claim.

The law is clear that a defendant has a constitutional right to present his own defense at trial. *Commonwealth v. Bryant,* 524 Pa. 564, 574 A.2d 590 (1990). A defendant may also be permitted to act as co-counsel even though he has counsel available, but that determination lies within the sound discretion of the trial court. *Commonwealth v. Colson,* 507 Pa. 440, 490 A.2d 811 (1985), *cert. denied,* 476 U.S. 1140, 106 S.Ct. 2245, 90 L.Ed.2d 692 (1986). Based upon our review of the record, we are satisfied that the trial court here did not abuse its discretion in permitting appellant to assist in his defense. First, our review of the record reveals that Appellant knowingly and intelligently waived his right against self-incrimination. The record demonstrates that Appellant was fully informed and indicated his understanding of the risks inherent in his participation in his own defense. In addition, this Court previously reviewed the competency determinations of the trial court, including those rendered at the time Appellant chose to testify, and concluded that [the] lower court did not err in finding Appellant competent. *Commonwealth v. Banks,* 513 Pa. at 336-344, 521 A.2d at 10-14. Appellant's final claim was, thus, properly denied by the trial court.

For all the foregoing reasons, the order of the Court of Common Pleas of Luzerne County is affirmed.[16]

NIX, C.J., files a concurring opinion.

MONTEMURO, J., is sitting by designation.

NIX, Chief Justice, concurring.

On direct appeal, I dissented on the basis that the trial judge failed to ensure that Banks made a knowing and intelligent waiver of his right to counsel by permitting him to introduce prejudicially inflammatory pictures. I continue to adhere to this view; however, I am constrained to recognize that this issue has been finally litigated and is not subject to collateral attack in its present posture. *See* 42 Pa.C.S. § 9544(a)(2).

[16] The Prothonotary of the Supreme Court is directed to transmit the complete record in this case to the Governor. 42 Pa.C.S. § 9711(i).

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Supreme Court, U.S.
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No. 02-1603

In The Supreme Court of the United States

JEFFREY A. BEARD, Commissioner, Pennsylvania Department of Corrections; JAMES PRICE, Superintendent of State Correctional Institution at Greene; RAYMOND J. COLLERAN, Superintendent of State Correctional Institution at Waymart; COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

GEORGE E. BANKS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTIONS PRESENTED

1. Does this Court's decision in *Mills v. Maryland*, 486 U.S. 367 (1988), constitute a new rule of law that may not be applied retroactively to cases that are already final?

2. Where the state supreme court has held that a jury instruction does not violate *Mills*, and the federal court of appeals has previously agreed with that rationale, is the state court's holding "contrary to or an unreasonable application of" clearly established federal law, within the meaning of 28 U.S.C. § 2254(d)(1), merely because the Court of Appeals has now changed course from its original *Mills* analysis?

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OPINIONS BELOW

Respondent George Banks was convicted of multiple murders in 1983, and these judgments became final at the conclusion of his direct appeal in 1987, before this Court decided *Mills*. Banks subsequently raised a *Mills* issue in his first petition for state collateral review; the Supreme Court of Pennsylvania rejected this claim in 1995. *Commonwealth v. Banks*, 656 A.2d 467 (Pa. 1995), reprinted at Joint App. 119-38.[1] This Court denied *certiorari* later that same year. *Banks v. Pennsylvania*, 516 U.S. 835 (1995).

A federal district court denied habeas corpus relief. In 2001, the United States Court of Appeals for the Third Circuit granted relief on the *Mills* issue. *Banks v. Horn*, 271 F.3d 527 (3d Cir. 2001), reprinted at Pet. App. 72-120. This Court unanimously reversed and remanded in a *per curiam* opinion, directing the Court of Appeals to consider the retroactivity question. *Horn v. Banks*, 536 U.S. 266 (2002), reprinted at Pet. App. 61-68. On remand, the same Third Circuit panel again granted relief. *Banks v. Horn*, 316 F.3d 228 (3d Cir. 2003), reprinted at Pet. App. 1-57. The court held that *Mills* did not constitute a new rule within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989), and therefore may be applied to older cases like this one. Pet. App. 5-38. Having disposed of the retroactivity question, the panel reinstated its decision on the merits from 2001. Pet. App. 38.

[1] Citations to "Joint App." refer to the Joint Appendix filed with this brief. Citations to "Pet. App." refer to the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

This is a federal habeas corpus proceeding brought by a state capital defendant pursuant to 28 U.S.C. § 2254. Petitioner, the Commonwealth of Pennsylvania, seeks review of the order of the United States Court of Appeals for the Third Circuit dated January 14, 2003, reversing the order of the district court, and granting the writ as to sentencing. The Petition for Writ of Certiorari was filed on April 14, 2003, and was granted by this Court on September 30, 2003. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also implicates 28 U.S.C. § 2254(d), which provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; . . .

STATEMENT OF THE CASE

Respondent George Banks murdered thirteen people with an assault rifle. Seven of the victims were infants and children, including five of his own. Banks also shot a fourteenth person, who survived to testify at trial – along with two young boys who saw Banks shoot their mother to death.

Banks lived in Wilkes-Barre, Pennsylvania. In 1982 he was 40, working as a prison guard in a state correctional institution. Over the preceding six years, Banks had acquired four different paramours, with whom he had fathered five children. The women ranged in age from 17 to 27 when Banks became involved with them. At various times all these woman and children lived with Banks. N.T. vol. I, pp. 12-14; vol. III, pp. 1015-16; vol. IV, pp. 1321-22.[2]

By the summer of 1982, however, Banks' "family" was falling apart.[3] In July, Sharon Mazzillo, mother of Banks' son Kismayu, moved with the child to her mother's residence. A custody battle ensued. Banks commented to friends that he would kill Sharon if he did not get his son back, and would kill her mother too, because she had put Sharon up to it. In early September, Regina Clemens,

---

[2] "N.T." refers to the notes of testimony from the trial, comprising six separate volumes but continuously paginated.

[3] Banks had a previous family consisting of his legal wife and their two daughters. The wife and children left the area after Banks began his new relationships. N.T. vol. III, pp. 1014-15.

mother of Banks' daughter Montanzima, also moved out, to a domestic violence shelter, and made plans to relocate to another state. N.T. vol. I, pp. 141-42; vol. III, p. 1161, 1186-88; vol. V, pp. 1789-90. And several days before the murders, Susan Yuhas, mother of Banks' children Bowende and Mauritania, was seen running from the house, with Banks after her. He yelled that she was leaving just like her sister (Susan and Regina were siblings). After he punched her in the head, she returned to the house with him. N.T. vol. III, pp. 901-03.

Economic pressures were also mounting despite Banks' prison job. Regina received a monthly $1200 Social Security check that would no longer be available to Banks if she moved away. Susan's income was also lost to him when she quit her job in early September. Banks put in for a transfer to a different prison, citing financial grounds. He also applied for a HUD loan. He voiced suspicions that his paramours were stealing money from him, and that they were unfaithful. N.T. vol. II, pp. 691, 812-14; vol. III, pp. 1215-16, 1273, 1326.

On the night of September 24, three of Banks' paramours were attending a party at a friend's house. Banks called the house to speak with one of them, Dorothy Lyons, the one woman who apparently had not announced an intention to leave him. Banks instructed Dorothy to retrieve his gun from the friend's house, where he had been keeping it. Dorothy, upset and crying, did as instructed, and the three women left the party for Banks' residence. This was the last point at which they, or their children, were seen alive.

The gun was an AR-15 assault weapon, a semi-automatic civilian version of the military's M-16 rifle.[4] Shortly before 2:00 AM, a series of gunshots were heard from Banks' house. He emerged from the house carrying the gun and ran into a group of four people standing on the street. One of them remarked, "hey, I know you." Banks replied, "you're not going to live to tell anybody about this." He leveled the gun in one hand and shot the man in the chest. Then he shot the next man in the chest, while the two remaining members of the group dove to the ground. N.T. vol. I, pp. 175-80, 194-97, 221-24.

Banks walked on down the street. He shortly came to a parking lot where two men were conversing from their cars. Banks pointed his rifle at one of the men and told him to move over or get his head blown off. Banks told the man that he had just killed his children, and it would be wise not to give him any trouble. He then drove away with the man still in the car, but soon released him. N.T. vol. I, pp. 275-78, 290-94.

Banks drove several miles to the trailer home where his fourth paramour, Sharon, had moved in with her mother. Also staying at the trailer that night were Sharon's and Banks' son Kismayu, Sharon's nephew Scott, and the two young sons of Sharon's mother. When Banks arrived he began pounding on the door, and broke it in. He told Sharon, with whom he had had the custody fight, that she should not have come between him and the child, and

---

[4] Banks had attempted to procure the parts necessary to render the weapon fully automatic, but did not complete the required forms, perhaps because of a prior felony conviction for a shooting during a robbery. N.T. vol. IV, pp. 1379-81; vol. V, p. 1862.

that now she could watch her son die. Banks then shot Kismayu, age 5, through the forehead. Sharon ran out the door. Banks shot her in the back. N.T. vol. IV, p. 1607, 1699.

Next Banks chased Scott, the nephew, down the hallway, until the boy tripped. Banks hit him with the gun, grabbed him by the neck, and accused him of using a racial epithet against Banks' son. The crying boy, age 7, said he didn't do it. Banks shot him in the back of the head.

Meanwhile, Sharon's mother tried to telephone the police. Banks spotted her and shot her between the eyes, blowing off the top of the skull. Her two sons, ages 9 and 11, were present. Banks told them he would get them next time, and left. The boys picked up the phone from their mother's body and completed the call to the police.

Authorities soon arrived at both crime scenes. All the shooting victims at the trailer were dead. At Banks' house, police discovered Banks' paramour Regina on a living room couch. She had been shot in the face. Banks' paramour Susan was in an armchair, with shots to the head and chest. In her arms was her daughter with Banks, Mauritania. The child, age 1, had been shot behind the ear. Also in the room was Banks' paramour Dorothy, who had been shot through the chest and neck, and Banks' son Bowende, age 4, shot in the face. Upstairs police found the body of Banks' daughter Montanzima, age 6, shot through the chest. In another bedroom were Dorothy's daughter (by another man), age 11, with defensive wounds through the arms and a fatal shot to the face, and Banks' son Foraroude, age 1, shot in the eye. All were dead at the scene. N.T. vol. II, pp. 818-56; vol. V, pp. 1945-2053.

The two victims from outside Banks' house were rushed to the hospital. The man who had recognized Banks died. The other man, although in critical condition, was evacuated by helicopter to a trauma center and survived.

Later that morning, police located Banks at the house of a friend, and surrounded the residence. Banks was still armed with the assault rifle, along with 112 rounds of ammunition. During the standoff and thereafter, Banks, the son of an interracial couple, complained that he could not get fair treatment because of racial prejudice, and that he had killed his children to spare them the same fate. He declared that he was going to kill himself, since he would die in the electric chair anyway. Despite repeated suicide threats, however, Banks elected to surrender without harming himself. N.T. vol. II, pp. 571-80, 588, 606, 625-26, 705-06, 724, 770.

During processing at the police station, Banks expressed remorse for one of the victims, his son Kismayu. He claimed that that shooting had been accidental. N.T. vol. II, p. 764.

Banks was brought to trial in June 1983 over a period of three weeks, before a jury selected in another portion of the state. Banks' defense team of three attorneys called 28 witnesses, including three forensic psychiatrists, to testify to Banks' love for his children and disturbed state of mind. Through his lawyers, his experts, and his own statements and testimony, Banks presented a variety of defense themes to the jury: 1) that he had amnesia and could not

remember the actual shootings;[5] 2) that he killed his children to save them from a life of racial prejudice; 3) that he was the victim of a police conspiracy to tamper with the evidence and cast him in a more culpable light; 4) that he was under the influence of alcohol and pills; and 5) that he was legally insane.[6]

On June 21, 1983, the jury returned guilty verdicts on twelve counts of first degree murder, one count of third degree murder, one count of attempted murder, and the remaining assault, robbery and theft charges. The next day, the court convened a sentencing hearing before the same jury. The Commonwealth sought to prove three aggravating circumstances: that Banks knowingly created a grave risk of death to other persons, 42 Pa. C.S.A. § 9711(d)(7); that he had a significant history of felony convictions involving violence, 42 Pa. C.S.A. § 9711(d)(8); and that he had been convicted of another offense committed at the time of the offenses at issue for which a sentence of life imprisonment or death was imposable, 42 Pa. C.S.A. § 9711(d)(10). Banks and his counsel, on the other hand, sought to demonstrate the presence of three mitigating circumstances: that Banks was under the influence of extreme mental or emotional disturbance, 42 Pa. C.S.A. § 9711(e)(2); that he had a substantially impaired capacity to appreciate the criminality of his conduct, or to conform

[5] The defense secured blood, CAT, and EEG examinations of Banks, and later repeated the tests a second time to evaluate potential organic problems. The results were negative. N.T. vol. III, pp. 1029-31.

[6] A search of defendant's house revealed a notebook entry written *before* the crimes, in Banks' handwriting: "Not guilty, due to temporary insanity induced by the racial abuse of my family and young children." N.T. vol. IV, p. 1583.

his conduct to the requirements of the law, 42 Pa. C.S.A. § 9711(e)(3); and "any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense," 42 Pa. C.S.A. § 9711(e)(8).

The jury found the presence of one aggravating circumstance (the multiple murder aggravator, (d)(10)), and weighed this against the mitigating evidence. Pet. App. 117-18. The jury returned twelve death sentences.

Banks appealed directly to the Pennsylvania Supreme Court, as is the rule in Pennsylvania death penalty cases. 42 Pa. C.S.A. § 9711(h); Pa. R.A.P. 1941. The state supreme court affirmed on February 13, 1987, and denied reargument on May 28, 1987. *Commonwealth v. Banks*, 521 A.2d 1, 1-4 (Pa. 1987), reprinted at Joint App. 70-118. Banks' judgment became final when this Court denied *certiorari* on October 5, 1987. *Banks v. Pennsylvania*, 484 U.S. 873 (1987).

Several years later, in February, 1989, Banks filed a petition for collateral review under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541-46. He alleged, for the first time, that the trial court's sentencing instructions violated *Mills* by requiring that the jury be unanimous with respect to any mitigating circumstances. The PCRA court denied relief, however, and the Pennsylvania Supreme Court affirmed this decision on March 27, 1995. Joint App. 119-38.

In 1996, Banks filed a Petition for Writ of Habeas Corpus in federal court. Joint App. 3. He raised eleven claims, three of which had never been presented to the state courts. The district court denied the petition with prejudice, finding that the eight exhausted claims were meritless, and the others procedurally defaulted. *Banks v.*

Horn, 939 F. Supp. 1165, 1167, 1176 (M.D. Pa. 1996). The Third Circuit, however, found that the new claims were not defaulted, because the state court *might* yet entertain them – Banks had filed a second PCRA petition in state court in 1997, which was still pending. *Banks v. Horn*, 126 F.3d 206, 214 (3d Cir. 1997). Accordingly, the Third Circuit vacated the decision of the district court and directed that the petition should be dismissed without prejudice. *Id.*

The state courts, however, rejected Banks' second PCRA petition as untimely, pursuant to the one-year PCRA time limit that had become effective in 1996. *Commonwealth v. Banks*, 726 A.2d 374, 376 (Pa. 1999); *see* 42 Pa. C.S.A. § 9545(b). Banks returned to federal court and filed another habeas petition. The district court again ruled that the claims first raised in Banks' second PCRA petition, which had now been conclusively determined as untimely, were defaulted. *Banks v. Horn*, 49 F. Supp. 2d 400, 412 (M.D. Pa. 1999). As to the remaining claims, which had been properly presented in state court, the district court denied relief on the merits. *Banks v. Horn*, 63 F. Supp. 2d 525 (M.D. Pa. 1999), Pet. App. 129-176.

On appeal, however, the Third Circuit reversed and granted Banks a new sentencing hearing based on the *Mills* claim. 271 F.3d 527 (3d Cir., Oct. 31, 2001), reprinted at Pet. App. 72-120. The Third Circuit refused to consider whether *Mills* could properly be applied retroactively to pre-*Mills* cases like this one, because the state court had been able to resolve the *Mills* claim on the merits, without addressing the retroactivity issue. Pet. App. 98-104. After rehearing was denied, this Court granted the Commonwealth's Petition for Writ of *Certiorari*, and simultaneously issued a *per curiam* opinion reversing the Court of Appeals' judgment. The Court explained that federal habeas courts *must*

decide the retroactivity question when properly raised by the state, and directed the Third Circuit to do so. Pet. App. 62-68. This Court also noted that the circuits are split on the question of whether *Mills* is retroactive. Pet. App. 66 & n.4.

On remand, both parties filed supplemental briefs in the Court of Appeals on the retroactivity question, and on January 14, 2003, the Third Circuit issued its latest opinion, holding that *Mills* did not create a new rule at all and therefore its holding can be applied to this case. *Banks v. Horn*, 316 F.3d 228 (3d Cir. 2003), Pet. App. 1-38. Two judges joined the opinion of the court; the third member of the panel concurred separately.[7] The concurrence recognized that *Mills* was indeed a new rule, and that it did not satisfy either of the two exceptions permitting retroactivity under *Teague v. Lane*, 489 U.S. 288 (1989). Nevertheless, despite this Court's clear instruction that *Teague must* be applied when properly raised by the state on federal habeas review (regardless of the disposition of the claim in state court), the concurrence wrote that *Teague* has no application where, as here, the state courts have reached the merits of the underlying claim. Pet. App. 39-57.

The Commonwealth filed a second Petition for Writ of *Certiorari* in this Court on April 14, 2003. This Court granted the petition on September 30, 2003.

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[7] Pursuant to Third Circuit IOP 15.2 (governing death penalty appeals), the same three Third Circuit judges (Sloviter, Roth and Rendell, JJ.) decided both the 2001 appeal (granting the writ based on *Mills*) and the 2003 remand (finding that *Mills* could be applied to this case despite the rule against retroactivity).

SUMMARY OF THE ARGUMENT

Respondent's thirteen capital convictions became final at the conclusion of his direct appeal process in 1987. In 1988, this Court decided *Mills v. Maryland*, 486 U.S. 367 (1988). Now, fifteen years later, the United States Court of Appeals for the Third Circuit has applied *Mills* retroactively to void the death sentences on collateral review.

This result violates the retroactivity bar established by this Court in *Teague v. Lane*, 489 U.S. 288 (1989). *Mills* created a new rule of law. Contrary to the Third Circuit's conclusion, that rule was not dictated by *Lockett v. Ohio*, 438 U.S. 586 (1978), and its progeny. At best it may be said that the *Lockett* precedent supported the result in *Mills*; but that is not enough to overcome the *Teague* bar. A rule is new unless any other result would have been unreasonable. Yet members of this Court have stated that the issue in *Mills* was not even controlled, let alone *compelled*, by *Lockett*. The states were in no better position than those justices to foresee *Mills* before it was decided. They were certainly aware of *Lockett*, and took rapid steps to implement its holding by broadening mitigation categories. But they could not have known before *Mills* arose that the *Lockett* line would someday require them to reconsider normal unanimity rules when it came to juror consideration of mitigating circumstances. This Court, in *Saffle v. Parks*, 494 U.S. 484 (1990), has for *Teague* purposes distinguished between rules that govern *what* evidence may be considered, like that in *Lockett*, and rules that govern *how* evidence may be considered, like that in *Mills*. *Lockett* principles may inform the *Mills* result, but they do not dictate it.

Nor does the new rule of *Mills* satisfy either of the two narrow exceptions allowing retroactive application on collateral review. *Mills* did not place private individual conduct beyond the power of the state to proscribe. Neither did it uncover a hitherto unknown bedrock principle of due process akin to the right to indigent counsel. This Court has several times rejected *Teague* second-exception status for new rules governing consideration of aggravating and mitigating circumstances. *Mills* is not categorically different.

Even if the application of *Mills* in this case did not violate the retroactivity bar, it would certainly violate the AEDPA deference requirement. The instruction here, which tracked Pennsylvania's capital sentencing statute, did not preclude individual consideration of mitigating evidence; on the contrary, it required jurors to weigh aggravating factors against any mitigating evidence unless they all agreed that there were **no** mitigating circumstances proven. The Third Circuit itself originally held that such an instruction comported with *Mills*. The Pennsylvania courts followed that decision. Years later, but before AEDPA, the Third Circuit effectively overruled its previous *Mills* analysis, explicitly acknowledging that the issue was debatable. Now the court has begun applying that pre-AEDPA ruling as if it were decisive in post-AEDPA cases like this one. That is a far cry from the deference required by the statute. The Pennsylvania courts' application of *Mills* – as reflected in the Third Circuit's own original views on the question – was not erroneous, nor by any means unreasonable.

The Court of Appeals' current *Mills* pronouncement contravenes the *Teague* constraint against retroactive application of new rules on collateral review. It conflicts

with the AEDPA command of deference to the reasonable judgments of state courts. The decision below must be reversed.

ARGUMENT

I. The rule of *Mills v. Maryland* should not be applied retroactively.

The Third Circuit granted relief to Banks based on a perceived violation of *Mills v. Maryland*, 486 U.S. 367 (1988). *Mills*, however, was decided after Banks' judgment became final. The primary question presented by this case, therefore, is whether *Mills* can be applied retroactively.[8]

In its latest opinion, the Third Circuit continues to demonstrate a basic misunderstanding of the *Teague* rule against retroactivity. In 2001, the Court of Appeals mistakenly held that the federal courts may ignore the retroactivity question altogether where the state courts have not first considered it. This year, required to address *Teague*, the court fundamentally misapplied *Teague's* "new rule" jurisprudence. The court held that *Mills* was not a new rule, that no reasonable jurist could possibly have disagreed with the outcome in that case, and that any alternative result in *Mills* would have been "completely

[8] Three members of this Court have suggested that the "*Mills*" rule – the prohibition of a unanimity requirement for mitigating circumstances in capital cases – was not decided in *Mills* at all, because the question was not presented. *See McKoy v. North Carolina*, 494 U.S. 433, 457-63 (1990) (Scalia, J., with Rehnquist, C.J., and O'Connor, J., dissenting). Under this view, then the "*Mills* rule" is really the "*McKoy* rule."

untenable." Pet. App. 30. The court even suggested that *Mills* was such a predictable application of older law that its very existence might be "irrelevant." Pet. App. 34 n.13. As explained below, this new rule conclusion is wrong, and its overstatement is remarkable. Nor does *Mills* qualify for the narrow exceptions to the *Teague* bar on retroactive application of new rules of law.

A. *Mills* was a new rule within the meaning of *Teague*.

This Court has strictly limited retroactive application of new rules to judgments that are already final. Prior to that point, it is possible, and at times even advisable, to tinker with procedure. But such procedural adjustments rarely lead to fundamental breakthroughs in fairness that would justify the reversal of all prior convictions. There are costs associated with retroactivity: "Application of constitutional rules not in existence at the time a conviction becomes final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague*, 489 U.S. at 309. Nor does retroactive application of new rules serve the deterrent function at the heart of habeas corpus. The threat that a criminal conviction might one day be overturned pursuant to a future rule does not deter state courts from conducting criminal proceedings unlawfully, because state judges will not be influenced by federal court enforcement of a rule that does not yet exist.

The standards for determining if a rule is "new" reflect these principles. "A holding constitutes a 'new rule' within the meaning of *Teague* if it 'breaks new ground,' . . . or was not *dictated* by precedent existing at the time the

defendant's conviction became final." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997) (citations omitted) (emphasis in original). Put another way, a rule is not new if a state court considering the claim at the time the judgment became final "would have felt compelled to conclude that the rule [he] seeks was required by the Constitution." *Lambrix v. Singletary*, 520 U.S. 518, 521 (1997), *quoting Saffle v. Parks*, 494 U.S. 484, 488 (1990).

Accordingly, this Court classifies most rules – even "gradual developments in the law" – as "new" under *Teague*. *See Sawyer v. Smith*, 497 U.S. 227, 234-36 (1990) (purpose of *Teague* is to prevent disruption of final judgments by "gradual developments in the law," which should be viewed as "new"). *See also O'Dell*, 521 U.S. at 153 (rule of *Simmons v. South Carolina*, 512 U.S. 154 (1994), requiring jury to be instructed that life sentence carries no possibility of parole if defendant's future dangerousness is at issue, would be new under *Teague*); *Lambrix*, 520 U.S. at 528 (rule of *Espinosa v. Florida*, 505 U.S. 1079 (1992), that sentencer in "weighing" state may not constitutionally consider invalid aggravating circumstances, was new under *Teague*); *Gray v. Netherland*, 518 U.S. 152, 167 (1996) (new rule required for holding that due process mandated more than a day's notice of new evidence to be presented at capital sentencing hearing); *Gilmore v. Taylor*, 508 U.S. 333, 344 (1993) (rule mandating explicit instruction to jury – not to return murder conviction if mitigating mental state is found – would be new under *Teague*); *Graham v. Collins*, 506 U.S. 461, 477 (1993) (rule that Texas capital instructions excluded relevant categories of relevant evidence would be new under *Teague*); *Saffle v. Parks*, 494 U.S. 484, 489 (1990) (prohibition of "anti-sympathy" instruction in capital case is new rule).

Despite this Court's careful approach to the new rule question, the Third Circuit had little trouble concluding that *Mills* was not new at all. The court's reasoning was simple: *Mills* is about allowing consideration of mitigating evidence; this Court has held, most prominently in *Lockett v. Ohio*, 438 U.S. 586 (1978), that the jury must be allowed to consider mitigating evidence; therefore *Mills* was already the law before it existed. Once this Court had decided *Woodson v. North Carolina*, 428 U.S. 280 (1976) (striking down statute making death sentence mandatory on conviction); *Roberts v. Louisiana*, 428 U.S. 325 (1977) (same); *Lockett* (defendant improperly prohibited from presenting mitigating evidence concerning his character and offense); and *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (defendant improperly prohibited from presenting evidence of family background), the die was cast, and any reasonable jurist should have known what the result in *Mills* would be. Pet. App. 17-20.[9]

Indeed, the Third Circuit ventured even further into the pre-*Mills* universe to discover its creation. The court pointed to this Court's decision in *Andres v. United States*, 333 U.S. 740 (1948), forty years before *Mills*. *Andres*, interpreting the then federal death penalty statute, held that a capital sentence could not follow automatically from a jury determination of guilt, even if the jury had the

[9] The Third Circuit also relied on *Skipper v. South Carolina*, 476 U.S. 1 (1986) (defendant improperly prohibited from presenting mitigating evidence concerning prison adjustment); *California v. Brown*, 479 U.S. 538 (1987) (jury properly instructed not to be swayed by mere sentiment or sympathy); and *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (defendant improperly prohibited from presenting nonstatutory mitigating evidence). Pet. App. 20-22.

discretion to take the extra step of affirmatively excluding death. According to the Third Circuit, *Andres* "invokes . . . themes . . . consistent with" the current rule that juries need not be unanimous on particular mitigating circumstances during the weighing process. *Andres*, therefore, along with the *Lockett* line of cases, rendered unreasonable any conclusion other than that eventually reached in *Mills*. Pet. App. 22-24. By the time 1988 rolled around, *Mills* was not only not new – it was, by the lights of the Third Circuit, banal.

The difficulty with the Third Circuit's analysis is that, if *Mills* was already the law at least a decade if not four before it was actually decided, the news was well hidden even from members of this Court. Even in *Mills* itself, there was no indication that the Court had previously addressed, let alone dictated a result on, the question of whether individual jurors (as opposed to the sentencer per se) must be allowed to consider mitigating factors at the weighing stage. The majority in *Mills* did quote the *Lockett* cases for the "well established" proposition that "the sentencer may not . . . be precluded from considering any relevant mitigating evidence." 486 U.S. at 374-75 (emphasis and internal quotation marks deleted). But there was no dispute that the jury in *Mills* could deliberate on any evidence that the defendant chose to present. The crucial issue was whether, in the absence of unanimity, individual jurors must be permitted to carry over that consideration from the fact-finding stage into the weighing stage.

Certainly the *Lockett* line, and even *Andres*, were authority for the resolution of that issue; contrary to the Third Circuit's understanding, however, the existence of prior precedent, even "controlling" prior precedent, cannot

resolve the *Teague* new rule question. The Third Circuit's review concluded that *Mills* was an application of previous case law. But if this analysis were sufficient, it would swallow up the new rule rule. Virtually every case is said to be controlled by prior law. Only in rare instance does the Court explicitly depart from stare decisis. Yet under *Teague* the Court has found almost every rule to be new, and has established that the standard for determining "newness" is not whether a decision resulted from prior precedent. Instead, a rule is new whenever it is the product of reasoned debate rather than indisputable mandate.

This Court's followup to *Mills*, *McKoy v. North Carolina*, 494 U.S. 433 (1990), makes the newness point even more plainly. That case, decided two years later, demonstrates that the *Mills* rule was not an indisputable conclusion even after *Mills* itself. Four current members of the Court disputed that the outcome in *Mills* was "controlled or governed" by *Lockett* and *Eddings*, let alone dictated by those decisions. *See McKoy*, 494 U.S. at 452-56 (Kennedy, J., concurring); *id.* at 471 (Scalia, J., dissenting, with Rehnquist, C.J., and O'Connor, J.). The Third Circuit brushes aside the import of these *McKoy* opinions, on the ground that they are not a majority. Pet. App. 33. Obviously not; but this misses the point. The significance of the *McKoy* concurrence and dissent for new rule purposes is that four justices of this Court clearly did not understand the *Mills* rule to be **dictated** by pre-*Mills* precedent.[10]

[10] The *Mills* majority itself concluded its opinion with a reference to "[e]volving standards of societal decency," 486 U.S. at 383 – surely a suggestion of new development in the law.

Indeed, the legal world outside this Court was similarly unaware of the putative pre-*Mills Mills* rule that is now so clear to the Third Circuit. In Ohio, for example, the state quickly responded to the *Lockett* decision by amending its capital sentencing statute to open up the categories of mitigating evidence permitted to the defense. *See State v. Watson*, 572 N.E.2d 97, 112 (Ohio 1991) (describing post-*Lockett* amendments to Ohio death penalty law). But the state failed to discern from *Lockett* or its progeny any mandate that would affect the *manner* in which the jurors considered this broader mitigation evidence, whether unanimously or individually, during fact-finding or during weighing. That development did not occur until **after** *Mills*, when the state courts adopted new instructions specifying that individual jurors could weigh mitigating circumstances absent unanimity. *See State v. Brooks*, 661 N.E.2d 1030, 1042 (Ohio 1996) (announcing new post-*Mills* non-unanimity instruction).

A similar process took place in Maryland. There the state immediately added a "catch-all" mitigating factor to its sentencing statute after *Lockett*, *see Mills v. State*, 527 A.2d 3, 27 (Md. 1987) (McAuliffe, J., dissenting), but made no change to its unanimity and weighing instructions until after its decision in *Mills* itself. And the same thing happened in Pennsylvania. *See* 42 Pa. C.S.A. § 9711(e)(8) ("[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense") (added September 13, 1978); Pa. R. Crim. P. 807 (prescribing verdict sentencing slip to identify mitigating

circumstances "found by one or more of us"; adopted February 1, 1989, citing to *Mills*).[11]

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[11] Similarly, the North Carolina death penalty instructions were also changed two separate times – after *Lockett*, and after *Mills*. *See State v. McDougall*, 301 S.E.2d 308, 326-28 (N.C.) (explaining new post-*Lockett* instructions in North Carolina), *cert. denied*, 464 U.S. 865 (1983); *State v. Lee*, 439 S.E.2d 547, 569 (N.C.) (describing new post-*Mills* instruction), *cert. denied*, 513 U.S. 1035 (1994).

In fact, before *Mills* courts might reasonably have assumed that jury unanimity at all phases of capital sentencing was not only permitted but preferred. In *Furman v. Georgia*, 408 U.S. 238 (1972), this Court invalidated the death penalty, largely on the ground that capital sentencing discretion was insufficiently limited. More than half of the states that enacted new death penalty statutes in response to *Furman* adopted *mandatory* death penalty laws – that is, the jury (or judge) had *no* discretion to reduce the penalty for specified offenses. *See Rockwell v. Superior Court of Ventura County*, 18 Cal. 3d 420, 448 (1976).

Even when this Court later invalidated mandatory death penalty statutes, the principle of limited discretion remained. *See Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ., announcing judgment of the Court) ("[jury] *discretion must be suitably directed and limited* so as to minimize the risk of wholly arbitrary and capricious action.") (emphasis supplied). In accordance with that principle, for example, states may require the defendant to prove mitigating circumstances by a preponderance of the evidence. *Walton v. Arizona*, 497 U.S. 639, 649-51 (1990) (Opinion by White, J.). Before *Mills* and *McKoy*, courts might understandably have concluded that, just as a preponderance burden was an appropriate means of limiting discretion (the defendant must prove the existence of mitigating circumstances), so too was a unanimity process (the defendant must prove the existence of mitigating circumstances *to every juror*).

Moreover, as the dissent in *McKoy* noted, this Court has previously *approved* unanimity requirements in similar contexts. *See Martin v. Ohio*, 480 U.S. 228 (1987) (approving unanimity requirement as condition to establishing self-defense in capital murder case); *Patterson v. New York*, 432 U.S. 197 (1977) (as condition to establishing defense of extreme emotional disturbance in murder case); *Rivera v. Delaware*, 429 U.S. 877 (1976) (as condition to establishing defense of insanity in murder case).

These jurisdictions recognized what this Court itself made explicit in *Saffle v. Parks*, 494 U.S. 484 (1990): that the *Lockett* principle does not dictate all succeeding rules concerning mitigating evidence in capital cases. In *Saffle*, the defendant argued that *Lockett* mandated an instruction requiring jurors to consider any feelings of sympathy based on mitigating evidence. The Court held that any such rule would be new under *Teague*. "There is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." 494 U.S. at 490. *Mills*, like *Saffle*, was not about the **kind** of mitigating evidence a jury may consider, but about the **way** the evidence may be considered – collectively or individually, at each stage of deliberation. Just like *Saffle*, *Mills* was a novel rule.[12]

To be "dictated" by prior precedent, a rule must be logically *necessary* from the cases preceding it. Where it is

[12] The Court of Appeals below struggled to distinguish *Saffle*. The court asserted that *Mills* was actually about "what" mitigating evidence could be considered, rather than "how," because an *individual* juror might have been precluded from considering any mitigating evidence (at least at the weighing stage) if others did not agree with him. Pet. App. 35. But the defendant in *Saffle* made exactly the same argument: absent the requested instruction, any juror who saw the defendant's mitigation in terms of sympathy might have been barred from considering the evidence at all. 494 U.S. at 492. The point of *Saffle* is not the *quantum* of evidence potentially affected by alleged error. The point, rather, is that the *Lockett* cases addressed the outright exclusion of particular *categories* of mitigating evidence, precluding consideration at any stage, by any juror. Other cases, like *Mills* and *Saffle*, addressing the mitigation *process*, may or may not be resolved under *Lockett* precedent; but they are not *dictated* by it.

not, or even where there is doubt, *Teague* demands that the "good faith" decisions of state courts must be validated. Under this standard, *Mills* was clearly new, and its retroactive application should be barred.

B. *Mills* does not meet either of the exceptions to *Teague*.

Teague recognizes that in rare cases a new rule might still receive retroactive application. But no judge below has found that the *Mills* rule in question here warrants an exception to the retroactivity bar, and the concurring judge specifically found that it does not. Nor is there any basis for a contrary conclusion.

There are two exceptions under *Teague*, but only one of these is even arguably relevant in the *Mills* context.[13] This is the so-called "second *Teague* exception"; as this Court has explained, "[a] rule that qualifies under this exception must ... 'alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding." *Sawyer*

[13] The first *Teague* exception is for rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 311, *quoting Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part). In *Mackey*, Justice Harlan gave as one example (among others) the rule of *Griswold v. Connecticut*, 381 U.S. 479 (1965), where the Court held that a Connecticut law criminalizing the use of contraceptives by married people violated substantive due process. 401 U.S. at 693 n.7. More recently, this Court has suggested that the second *Teague* exception might encompass a claim that a mentally retarded prisoner cannot be executed. *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *overruled on other grounds*, *Atkins v. Virginia*, 536 U.S. 304 (2002).

v. Smith, 497 U.S. 227, 242 (1990), *quoting Teague*, 489 U.S. at 311.

This Court has never held that *any* new rule meets this difficult standard. Instead, the Court has offered limited examples of fundamental principles, now long established, that illustrate the narrowness of the second exception. For example, the rule of *Gideon v. Wainwright*, 372 U.S. 335 (1963) – announcing the right of criminal defendants to be represented by counsel – is the sort of "bedrock procedural element" envisioned by *Teague*. *Saffle*, 494 U.S. at 495.

Such rules protect not only our fundamental sense of fairness and legal order, but the factual accuracy of the guilt-determining process as well. This is by careful design: *Teague* made clear that its second exception is limited to those new rules that are *both* "implicit in the concept of ordered liberty" *and* "central to an accurate determination of innocence and guilt." 489 U.S. at 311-13. Not surprisingly, this Court has warned that the second *Teague* exception will be rare in application, and that "we believe it unlikely that many such components of basic due process have yet to emerge." *Teague*, 489 U.S. at 313. *See also Graham*, 506 U.S. at 478 (this exception is "meant to apply only to a small core of rules") (internal quotations omitted).

On the other hand, the list of rules that do *not* meet the second *Teague* exception is long. *See, e.g., O'Dell v. Netherland*, 521 U.S. 151, 167 (1997) (rule of *Simmons v. South Carolina,* requiring that jury be instructed of defendant's parole-ineligibility if prosecution argues that he poses a future danger, not a watershed rule under *Teague*); *Lambrix v. Singletary*, 520 U.S. 518, 539-40

(1997) (rule of *Espinosa v. Florida* – that if judge in "weighing" state is required to give weight to jury's sentencing recommendation, neither judge nor jury can consider invalid aggravating circumstance – does not qualify for second *Teague* exception); *Graham*, 506 U.S. at 478 (proposed new rule requiring special jury instruction concerning mitigating evidence would not qualify for *Teague* exception); *Sawyer*, 497 U.S. at 241-44 (rule of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that Constitution prohibits imposition of death sentence where sentencer has been led to believe that ultimate responsibility for determining appropriateness of punishment lies elsewhere, not "watershed rule" under *Teague*).

The *Mills* rule does not qualify for the second *Teague* exception, either. This Court has repeatedly denied second exception protection for changes to the process of considering aggravating and mitigating circumstances. *See Sawyer; Graham; Lambrix*. In each case it was argued that the changes would enhance the accuracy and fairness of the proceeding. That is true to at least some degree, however, as to any new rule that the Court would choose to adopt. As the Court observed in *Sawyer*, "[i]t is difficult to see any limit to the definition of the second exception if cast" in such terms. 497 U.S. at 243. Surely the *Caldwell* rule at issue there established an important principle: "that the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere." *Sawyer*, 497 U.S. at 233. But *Caldwell*'s improvement in the capital sentencing process, like *Mills*', was not the sort of bedrock element equivalent to the right to counsel established in *Gideon*. For thirty years this

Court has worked to harmonize the two principles of its capital jurisprudence: guiding discretion while permitting mitigation. *Mills* was a notable leg in that winding journey; but it does not rise to the level of *Teague*'s second exception.

Accordingly, this Court should hold that the *Mills* rule is new within the meaning of *Teague*, and that it does not meet either of the exceptions to the retroactivity bar.[14]

[14] The concurring opinion in the court of appeals agreed with the Commonwealth's position on both these points, but nonetheless argued that the Third Circuit was free to disregard *Teague*. This approach flies in the face of this Court's opinion in this very case last year, ordering consideration of *Teague*. Pet. App. 61-68.

Ignoring that directive, the concurring opinion noted that, when the Pennsylvania Supreme Court reviewed this case on collateral appeal, it employed a "relaxed waiver" rule that allowed Banks to overcome a procedural default. The concurrence then maintained that, since the state court here reached the merits of the *Mills* claim, the federal courts should get the same opportunity, even if they have to set aside *Teague* to do so, because *Teague* is just a rule of "comity." This argument is misplaced on every level.

Preliminarily, Pennsylvania's waiver rules had nothing to do with its treatment of the retroactivity question here. The state supreme court noted that some of Banks' claims may have been defaulted by failing to preserve them during the direct appeal process, but that the court would relax its default rule for purposes of Banks' collateral appeal. Joint App. 122 n.7. Having done so, however, the court remained free to address the retroactivity of *Mills*, as it has done in numerous other collateral appeals. *See* n.19 *infra*. Retroactivity is not a species of procedural default; it is a substantive inquiry necessary to determine what is the applicable law. The state court chose not to base its decision here on retroactivity grounds simply because it was not asked to do so, and because it had available precedent that readily disposed of the *Mills* claim on the merits. The "relaxed waiver" practice discussed in the concurring opinion was irrelevant to the state court's

(Continued on following page)

II. The Pennsylvania Supreme Court's rejection of the *Mills* claim was a reasonable application of federal law.

Even if this Court were to find that the rule of *Mills* was not new, or if it is retroactive, there is one more issue here – the merits. The court below engaged in a textbook misapplication of the AEDPA standard of review when it considered the merits of Banks' *Mills* claim in its 2001

disposition of the *Mills* claim on the merits rather than through retroactivity analysis.

Nor does anything about the state court's approach somehow excuse the federal habeas courts from their obligation to apply *Teague*. The concurrence averred that the state court, because it reviewed the *Mills* claim on its merits, treated the claim "as on" direct appeal. Pet. App. 56. In other words, suggested the concurrence, if a state court ever addresses the merits of a claim on collateral review, it's not really collateral review, and the federal courts are released from the *Teague* rule. But the Third Circuit does not have the power to redefine Pennsylvania law on finality of judgment in order to circumvent *Teague*. The Pennsylvania Supreme Court has already ruled, in this very case, that direct review concluded and Banks' conviction became final when the court affirmed it in 1987 and this Court denied certiorari. *Banks*, 726 A.2d at 375. The fact that the state court later entertained claims on collateral review did not reopen or suspend the original judgment.

The inescapable error in the concurrence is its insistence that the purpose of the *Teague* rule is to accord comity to state court decisions. The sole support provided for this declaration is an extended discussion not of *Teague*, but of the exhaustion doctrine. Indeed, fully half of the pertinent section of the concurring opinion addresses exhaustion. Pet. App. 54-56. But retroactivity is not equivalent to exhaustion, any more than it is the same as procedural default. There is no "comity" excuse for failing to follow *Teague*. The Third Circuit tried that approach in the previous round of litigation here, when it took the position that it was absolved from *Teague* because the state court did not address retroactivity. Pet. App. 100-03. Now the concurring opinion has resurrected the same rationale – but without acknowledging that this Court squarely rejected that position last year. Pet. App. 65-67.

opinion. The court explicitly re-instated this analysis in its latest opinion. Pet. App. 38. Because the instructions reviewed in this case mirrored the Pennsylvania standard instructions in effect until approximately 1990, the Third Circuit's merits decision has been relied upon, and followed, in many other cases.[15]

Under the current habeas statute – as amended by the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") – the writ cannot be granted unless the state court's decision was contrary to, or an unreasonable application of, clearly established federal law, as established by this Court. 28 U.S.C. § 2254(d)(1). This Court has repeatedly emphasized that AEDPA means what it says: State court decisions *must* stand unless they are unreasonable, even if the federal courts disagree with the result. This principle has been illustrated in the past year by three unanimous reversals of Ninth Circuit opinions in which the Court of Appeals had overreached this plain standard. *See Yarborough v. Gentry*, 72 U.S.L.W. 3275 (October 20, 2003) (state court's rejection of claim that counsel presented an ineffective closing argument was reasonable application of Sixth Amendment law); *Woodford v. Visciotti*, 537 U.S. 19 (2002) (California courts' rejection of ineffectiveness claim in capital case was

[15] *Kindler v. Horn*, 2003 WL 22221208 *12-16 (E.D. Pa. 2003); *Fahy v. Horn*, 2003 WL 22017231 *41-42 (E.D. Pa. 2003); *Wallace v. Price*, 265 F. Supp. 2d 545, 569-71 (W.D. Pa. 2003); *Porter v. Horn*, 276 F. Supp. 2d 278, 299 (E.D. Pa. 2003); *Henry v. Horn*, 218 F. Supp. 2d 671, 679 (E.D. 2002); *Peterkin v. Horn*, 179 F. Supp. 2d 518, 521 (E.D. Pa. 2002); *Abu-Jamal v. Horn*, 2001 WL 1609690 *1 (E.D. Pa. 2001). Many other cases with similar claims are presently before federal district courts and the Third Circuit on habeas review, and have yet to be decided.

reasonable application of ineffectiveness standard, despite possible disagreement on the merits), and *Early v. Packer*, 537 U.S. 3 (2002) (state court's determination that trial judge's comments were improper was neither contrary to, nor unreasonable application of, federal law).[16]

The interpretation of jury instructions is exactly the kind of issue that is susceptible to reasonable disagreements. Here, the state supreme court found that the jury instructions did not violate *Mills*, and has repeated that holding many times. Indeed, when the *Mills* issue first reached federal court, a prior Third Circuit panel *agreed* with this conclusion and upheld an almost identical set of instructions. Then in this case the appeals court (following

[16] Although the Third Circuit has received less attention than the Ninth by way of AEDPA review in this Court, it has been at least as active in the death penalty arena: in the last decade, federal courts in Pennsylvania have granted the writ in *every* contested state capital habeas matter, over twenty cases to date. *Carpenter v. Vaughn*, 296 F.3d 138 (3d Cir. 2002); *Szuchon v. Lehman*, 273 F.3d 299 (3d Cir. 2001); *Jermyn v. Horn*, 266 F.3d 257 (3d Cir. 2001); *Appel v. Horn*, 250 F.3d 203 (3d Cir. 2001); *Kindler v. Horn*, 2003 WL 22221208 (E.D. Pa. 2003); *Fahy v. Horn*, 2003 WL 22017231 (E.D. Pa. 2003); *Wallace v. Price*, 265 F. Supp. 2d 545 (W.D. Pa. 2003); *Porter v. Horn*, 276 F. Supp. 2d 278 (E.D. Pa. 2003); *Yarris v. Horn*, 230 F. Supp. 2d 577 (E.D. Pa. 2002); *Henry v. Horn*, 218 F. Supp. 2d 671 (E.D. Pa. 2002); *Hackett v. Price*, 212 F. Supp. 2d 382 (E.D. Pa. 2001); *Pursell v. Horn*, 187 F. Supp. 2d 260 (W.D. Pa. 2002); *Peterkin v. Horn*, 179 F. Supp. 2d 518 (E.D. Pa. 2002); *Holloway v. Horn*, 161 F. Supp. 2d 452 (E.D. Pa. 2001); *Laird v. Horn*, 159 F. Supp. 2d 58 (E.D. Pa. 2001); *Holland v. Horn*, 150 F. Supp. 2d 706 (E.D. Pa. 2001); *Abu-Jamal v. Horn*, 2001 WL 1609690 (E.D. Pa. 2001); *Bronshtein v. Horn*, 2001 WL 767593 (E.D. Pa. 2001); *Hardcastle v. Horn*, 2001 WL 722781 (E.D. Pa. 2001); *Jacobs v. Horn*, 129 F. Supp. 2d 390 (M.D. Pa. 2001); *Rompilla v. Horn*, 2000 WL 964750 (E.D. Pa. 2000); *Whitney v. Horn*, 170 F. Supp. 2d 492 (E.D. Pa. 2000), *vacated and remanded*, 280 F.3d 240 (3d Cir. 2002); *Buehl v. Vaughn*, 1996 WL 752959 (E.D. Pa. 1996).

a subsequent precedent that was decided under *pre*-AEDPA law) disagreed with this result and granted relief. Such caprice is exactly what the AEDPA deference standard should preclude.

The trial court, in accordance with the Pennsylvania statute, did not instruct the jury that it must be unanimous to consider any mitigating circumstances; indeed the court instructed that the jury must be unanimous to *reject* any mitigating circumstances. This is the instruction in pertinent part, as quoted by the court below:

> The sentence you impose will depend on your findings concerning aggravating and mitigating circumstances. The Crime Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and **no** mitigating circumstances, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances.
>
> Remember, under the law of this Commonwealth, your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and **no** mitigating circumstance, or if you unanimously find one or more aggravating circumstances which then outweigh any mitigating circumstances. In all other cases, your verdict would be life imprisonment.

Pet. App. 110-111 (emphasis added).[17]

[17] As quoted in the Third Circuit opinion below. In the trial record, the two photographs actually appear several pages apart. Joint App. 21, 26.

These instructions do not violate *Mills*. They contain no requirement that the jurors be unanimous as to the presence of a particular mitigating factor before they can consider mitigating evidence. In fact, if the jury follows these instructions – and this Court presumes that they did, *see Penry v. Johnson*, 532 U.S. 782, 799 (2001) – then there is no constitutional problem. The jury was directed to proceed in several predictable stages. First, if the jurors unanimously agree that one or more aggravating circumstances have been proved, and they also unanimously agree that **no** mitigating factors are present, then they must return a sentence of death. If they are not unanimous with respect to the absence of mitigating factors – that is, if *any* of them believe that one or more mitigating circumstances are present – the jurors move to the second phase: that is, they *must* weigh aggravating circumstances against mitigating evidence. This is entirely proper, and it does not violate *Mills*.

The premise of the decision below, however, is that the jury could have misunderstood the instructions to mean something they did not say – that the last phrase quoted above, requiring the jurors to weigh "any mitigating circumstances," *might* have misled the jurors into weighing only "any *unanimously found* mitigating circumstances." But such a unanimity requirement simply is not there. The instruction, by its plain language, did not impose a unanimity requirement on the consideration of mitigators. The Third Circuit's contrary decision is nothing more than speculation that confusion was a *possibility*. That is not enough to override the decision of the state supreme court.

Already flawed, the opinion below went even further astray in its effort to appear in compliance with AEDPA.

Accordingly, the Third Circuit declared that **no** jurist could reasonably uphold these instructions in the face of a *Mills* challenge. This is truly a remarkable conclusion, because the Third Circuit has *itself* upheld similar instructions. A decade ago, a different Third Circuit panel rejected the theory that the jurors were reasonably likely to understand a comparable jury charge to require unanimity as to mitigating factors. *See Zettlemoyer v. Fulcomer*, 923 F.2d 284, 308 (3d Cir.), *cert. denied*, 502 U.S. 902 (1991). The instructions at issue in *Zettlemoyer* are set out in the margin;[18] even a cursory reading reveals this charge to be nearly identical to the instructions at issue here – the once-standard Pennsylvania instructions. The state courts, therefore, could – and did – assume that the Third Circuit had approved this charge. *See Commonwealth v. Abu-Jamal*, 1995 WL 1315980 (Phila. Ct. Com. Pls. 1995) (rejecting *Mills* challenge based on Third Circuit's *Zettlemoyer* decision). The Pennsylvania Supreme Court

[18] The trial court in *Zettlemoyer* issued a similar instruction:

> . . . If you find that aggravating circumstance [that the murder victim was a prosecution witness] and find no mitigating circumstances *or if you find that the aggravating circumstance which I mentioned to you outweighs any mitigating circumstance you find*, your verdict must be the death penalty.
>
> * * *
>
> . . . Under the law, as I said, you are obligated by your oath of office to fix the penalty at death *if you unanimously agree and find beyond a reasonable doubt that there is an aggravating circumstances [sic] and either no mitigating circumstance or that the aggravating circumstance outweighs any mitigating circumstances.*

923 F.2d at 307-308 (emphasis added).

continued to reject similar *Mills* claims over the next few years. *See, e.g., Commonwealth v. Travaglia*, 661 A.2d 352, 366 (Pa. 1995); *Commonwealth v. Murphy*, 657 A.2d 927, 936 (Pa. 1995); *Commonwealth v. Smith*, 650 A.2d 863, 867 (Pa. 1994); *Commonwealth v. Wilson*, 649 A.2d 435, 451 n.15 (Pa. 1994).

Years later, however, when Pennsylvania capital cases began reaching the Third Circuit in significant numbers, something changed. The new trend began in *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997), *cert. denied*, 524 U.S. 911 (1998). As a matter of English structure, the instruction in *Frey* was the same as the *Zettlemoyer* instruction. But the Third Circuit nevertheless found a way to distinguish the earlier case. The *Frey* panel contrived what it called a "sound bite" analysis, essentially requiring the reviewing court to count the number of words that come between the terms "unanimous" and "mitigating" in any given jury charge. 132 F.3d at 923. In *Frey*, the panel found the instruction to fail its "sound bite" test, because the words were too close together – their respective phrases were separated by seven words, rather than the longer seventeen word separation in *Zettlemoyer*. 132 F.3d at 923.

Whatever the merits of the "sound bite" analysis, it has been far from obvious to other federal courts, *see Abdur'rahman v. Bell*, 226 F.3d 696, 712 (6th Cir. 2000) (rejecting claim that proximity of terms "unanimous" and "mitigating circumstances" could have led to jury confusion), *cert. denied*, 122 S. Ct. 386 (2001), let alone to the state courts, which were somehow supposed to divine the sound bite test before the Third Circuit invented it. Remarkably, even in *Frey*, where the test originated, the Third Circuit itself recognized that the Commonwealth's

(and thus the state courts') contrary *Mills* analysis was at the very least "plausible," 132 F.3d at 924. But the *Frey* panel at least had an arguable basis for rejecting the state court's ruling, despite its plausibility, *because Frey was a pre-AEDPA case*. The Third Circuit was not yet required to defer to plausible, *i.e.*, not unreasonable, state court rulings.

With this case, however, and with many others since, the Third Circuit has gone dramatically further. *Frey* is no longer merely the supposedly better interpretation of two plausible alternatives – now, according to the Third Circuit, it is the **only reasonable conclusion**. The motivation for this turnabout is clear: to provide the appearance of compliance with the AEDPA deference standard. But motivation is not explanation, and the Third Circuit has never explained how it could conclude that the state court rulings in question are not just erroneous but beyond reason. In rejecting the state court's *Mills* ruling in its 2001 merits decision, the Court of Appeals did not discuss *Zettlemoyer*, the 1991 case in which it had upheld Pennsylvania's mitigation instruction.[19] Similarly, the court did not even mention its 1997 conclusion in *Frey* that Pennsylvania's interpretation of *Mills* was plausible – and therefore *ipso facto* not unreasonable under AEDPA.[20]

[19] The only passing mention of *Zettlemoyer* in the panel's 2001 opinion appears in a lengthy block quote from *Frey*; *Zettlemoyer* is never specifically identified or explained, and no citation is given. Pet. App. 113. In its 2003 opinion, the panel cites *Zettlemoyer* only to note that the *Mills* retroactivity question was not decided in that case. Pet. App. 9 n.3.

[20] The Pennsylvania Supreme Court, on the other hand, has noted the Third Circuit's flip-flop on *Mills*, and has repeatedly chosen to

(Continued on following page)

Subsequent case law, unlike the decision below, has at least acknowledged the conflict, but has done nothing to resolve it. *See Abu-Jamal*, 2001 WL 1609690 at *120, 126 (despite "linguistically similar" charge in *Zettlemoyer*, court "compelled to conclude" that relief is required by *Banks* and *Frey*).

The Third Circuit's tergiversation on *Mills* is not only unexplained; it is indefensible. To begin with, the court has applied the wrong standard by which to measure jury instructions. While it used to be appropriate to reject jury instructions that *might* be misunderstood, that is no longer the proper test. In *Boyde v. California*, 494 U.S. 370 (1990), this Court specifically rejected evaluative inquiries which primarily emphasized the *possibility* of juror confusion, that is, whether reasonable jurors "*could have*" been confused, or whether there was "*a substantial possibility*" that the jury was confused. *Id.* at 379. The Court in *Boyde* also rejected standards based on the mere possibility that a *single juror* was misled, rather than the jury as a whole. The Court adopted a more deferential and reliable test: "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."

follow the federal court's original analysis. *See Commonwealth v. Chester*, 733 A.2d 1242, 1256 n.14 (Pa. 1999) (citing *Zettlemoyer* in rejecting *Mills* claim; court also observes that *Frey* failed to apply *Teague* rule to bar retroactive application of *Mills*); *Commonwealth v. Laird*, 726 A.2d 346, 359 n.12 (Pa. 1999) (same); *Commonwealth v. Breakiron*, 729 A.2d 1088, 1097 n.7 (Pa. 1999) (noting disagreement with *Frey*), *cert. denied*, 528 U.S. 1169 (2000); *Commonwealth v. Cross*, 726 A.2d 333, 337-38 (1999) (same; in the alternative, *Mills* should not apply retroactively).

494 U.S. at 380. This carefully reformulated standard requires a more significant showing on the claimant's part in order to demonstrate a constitutional violation, as this Court explicitly recognized. *See id.* ("a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a *possibility* of such an inhibition") (emphasis added); *see id.* at 387 (Marshall, J., dissenting) ("the majority's reasonable likelihood standard *is not met* where a reasonable juror *could* or *might* have interpreted a challenged instruction unconstitutionally") (emphasis added, internal quotation marks omitted).

Here, the Third Circuit repeatedly invoked a pre-*Boyde* standard. The court asked whether the jury "*could have*" interpreted the instructions improperly; the court also re-introduced the single juror standard, asking whether "*a reasonable juror could* so conclude." Pet. App. 112, 116 (emphasis added) (citation omitted). This is clearly not the standard required by law. Only once did the court cite to the correct *Boyde* formulation, *id.* at 109, but it then failed to apply it – the pre-*Boyde* standard is repeated again and again. *See* Pet. App. 106 ("the critical question is ... whether a reasonable jury *could have* interpreted the instructions in an unconstitutional manner") (emphasis added), Pet. App. 109 (same), Pet. App. 112 (it is "quite possible" that instructions had been interpreted improperly) (citation omitted).

The court apparently came to this quandary by failing to update its reading of *Mills*. *Mills* was decided before *Boyde*, and in *Boyde* this Court specifically noted that the *Mills* opinion offers several improper formulations of the instructional standard: for example, whether jurors "could have" been confused, or whether there was a "substantial possibility" of confusion. *Boyde*, 494 U.S. at 378. But these

standards are no longer correct, and so the Third Circuit was wrong to use them. The underlying issue here, properly framed, is whether the jury instructions, measured by the *Boyde* standard, raised a reasonable probability that the jury would misunderstand the instructions so as to violate *Mills*.

Under AEDPA, of course, there is an additional layer of deference: The question for the federal habeas court is not whether the state court was wrong, but whether its decision was at least reasonable. It surely was. The Pennsylvania Supreme Court first noted that the instructions "mirror[] the language found in the death penalty statute of our Sentencing Code" and observed that it had upheld substantively identical instructions in *Commonwealth v. Hackett*, 627 A.2d 719 (Pa. 1993), *Commonwealth v. Marshall*, 633 A.2d 1100 (Pa. 1993), and *Commonwealth v. O'Shea*, 567 A.2d 1023 (Pa. 1989), *cert. denied*, 498 U.S. 881 (1990). Joint App. 124. The state court had earlier explained, in these cases and others, that this language did not require jury unanimity with respect to the *presence* of mitigating circumstances, but only regarding the *absence* of mitigating circumstances. *Hackett*, 627 A.2d at 725. Thus, even if a single juror believed that a particular mitigating circumstance was present, he or she could weigh mitigation against any aggravating circumstance the prosecution might prove. *Id.*

Rather than make the necessary case – that is, that the state court could not within reason have concluded that even a single juror would have properly understood the instructions – the Third Circuit sought out ostensible shortcomings in the state court's opinion. The Court of Appeals criticized the Pennsylvania Supreme Court, for example, for analyzing the instructions as written, rather

than attempting to divine their pyschodynamic significance for a jury. Pet. App. 109. But there is no requirement that a court must speculate on the cognitive impact of jury instructions beyond their plain meaning; it is enough if the instructions are clear and correct. As the Seventh Circuit said in rejecting a similar dispute about whether jurors were likely to "understand" a certain jury charge: "As there are no perfect trials, so there are no perfect instructions. How best to convey the law to lay persons sitting on juries is in the end a question for state legislatures and trial courts to resolve . . . . The jury is a means to resolve disputes, not a waystation by which the controversy at trial is transported to a higher level of generality as a social science dispute about juries." *Gacy v. Welborn*, 994 F.2d 305, 312 (7th Cir. 1993) (Easterbrook, J.).

Similarly, the Third Circuit suggested that the state court opinion was inadequate because it was insufficiently lengthy. But the state supreme court disposed of the *Mills* claim here on the basis of its earlier precedent rejecting challenges to *identical* instructions, and this application of precedent is exactly what an appellate court is supposed to do. The state court cited some of its previous decisions, Joint App. 124, all of which in turn cite *Commonwealth v. Frey*, 554 A.2d 27 (Pa. 1989), *cert. denied*, 494 U.S. 1038 (1990). In *Frey*, the Pennsylvania Supreme Court first applied *Mills* to the standard instructions in greater depth; the court in *Frey* had concluded that "individual jurors were free to weigh whatever mitigating circumstances they perceived . . . ." 554 A.2d at 31. It cannot be seriously contended that the state court was obligated to restate the analysis of *Frey* in every detail, over and over again, in all the cases that followed.

Nor do any other circumstances in this case support the Third Circuit's declaration that the state court's decision must be unreasonable. The federal court asserted that the verdict slip, on which the jury recorded its decision, somehow increased the possibility of confusion – but the slip's language exactly tracked the oral instructions. Pet. App. 116-118. If anything, the slip *reduced* the possibility of juror confusion. The whole point of the Third Circuit's "sound-bite" analysis, followed by the Court of Appeals in this case, is that, when the jurors *heard* "unanimous" and "mitigating" too "close" together, they might have misunderstood the correct juxtaposition of the words in relation to neighboring language. If the same words are *written down*, however, this is no longer a danger. On the contrary, where written instructions are at issue, the only question is whether the instructions are ambiguous as a matter of grammatical structure or language. But as a matter of grammar and language, the instructions in this case are identical to the instructions in *Zettlemoyer*, which the Third Circuit approved a decade ago. Thus, the existence of written instructions renders the state court decision *more* reasonable, not less.[21]

Finally, the reasonableness of the Pennsylvania Supreme Court's decision is also clear from a review of

[21] In state court, Banks also claimed that the polling of the jury had somehow created the possibility of juror confusion. Joint App. 127. At the end of the trial, Banks requested that the jury be polled; the trial court asked each juror whether he or she agreed with the verdict. In doing so, the court repeated some of the same language used in the instructions and the verdict slip. The Third Circuit agreed with the state court, however, that this jury polling had not made the possibility of juror confusion more likely. Pet. App. 119.

other federal decisions. Many other circuits have rejected *Mills* challenges to similar instructions and verdict sheets. *See, e.g., Smith v. Dixon*, 14 F.3d 956, 982 n.15 (4th Cir.) (*en banc*), *cert. denied*, 513 U.S. 841 (1994) (no *Mills* error where jury required to write "Yes" on the verdict form beside each mitigating circumstance "for which the defendant has satisfied you"); *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 1208 (1994) (same: court charged that jury must unanimously find that aggravating circumstance or circumstances outweighed "any" mitigating circumstances found); *Maynard v. Dixon*, 943 F.2d 407, 420 (4th Cir. 1991), *cert. denied*, 502 U.S. 1110 (1992) (instruction "impose[d] a unanimity requirement on aggravating circumstances and the other elements of the death sentence deliberations, but not . . . as to the mitigating circumstances"); *Scott v. Mitchell*, 209 F.3d 854, 874 (6th Cir.), *cert. denied*, 531 U.S. 1021 (2000) (no *Mills* issue where jurors told "all 12 of you must sign [the verdict form] . . . [i]t must be unanimous"); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1120 (6th Cir. 1990) (*en banc*) (nine of thirteen judges on *en banc* panel rejected *Mills* claim because there was no express unanimity requirement as to mitigation, and "it cannot be reasonably inferred that silence as to finding a mitigating factor would likely cause the jury to assume that unanimity was also a requirement"), *cert. denied*, 499 U.S. 970 (1991); *Coe v. Bell*, 161 F.3d 320, 338 (6th Cir. 1998), *cert. denied*, 528 U.S. 842 (1999) (instruction that jury must unanimously find aggravating circumstances are not outweighed by any mitigating circumstances does not violate *Mills*); *Gacy*, 994 F.2d at 306-308 (7th Cir. 1993) (approving instructions that failed to inform jury that single juror who believed mitigating circumstance was present could block death penalty); *Parker v. Norris*, 64 F.3d 1178, 1187 (8th Cir. 1995), *cert. denied*, 516 U.S. 1095 (1996) (that verdict form "failed to inform jurors that they could consider non-unanimous mitigating circumstances" did not violate *Mills*); *Griffin v. Delo*, 33 F.3d 895, 905-906 (8th Cir. 1994), *cert. denied*, 514 U.S. 1119 (1995) (instruction that jury must unanimously find that any mitigating circumstances outweighed aggravating circumstances did not imply that jury must be unanimous in finding a mitigating circumstance); *LaFevers v. Gibson*, 182 F.3d 705, *719 (10th Cir. 1999) ("[a] trial court need not, however, expressly instruct a capital sentencing jury that unanimity is not required before each juror can consider a particular mitigating circumstance").

The Third Circuit entirely ignored these decisions; in fact, the court did not examine *any* decisions outside of Pennsylvania applying *Mills* and *McKoy*. But it is plainly relevant that all of these courts have come to the same conclusion: If an instruction requires unanimity in one step of the sentencing process, that does not mean that the jury is likely to be confused about the other steps. The instructions here pass the *Boyde* test, as the Pennsylvania Supreme Court concluded. This represents – at the very least – a reasonable application of *Mills*.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Third Circuit, and deny the petition for writ of habeas corpus.

Respectfully submitted,

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In The Supreme Court of the United States

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Petitioners,

v.

GEORGE E. BANKS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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COUNTERSTATEMENT OF THE CASE

In June 1983, a jury convicted Banks of thirteen murders and sentenced him to death. The defense testimony at trial "presented a profile of a disturbed and paranoid man." *Commonwealth v. Banks,* 521 A.2d 1, 7 (1987) (*Banks I*).[1] Both prosecution and defense experts agreed that Banks suffered from a "serious mental defect," specifically, "paranoia psychosis." *Id.* at 8. Paranoia psychosis is a chronic, rare and severe mental illness characterized by fixed delusional beliefs. In Banks' case, the fixed delusions involved racial persecution, violence and racial conspiracies. R. 1024-25, 2079-80.

One source for Banks' delusional beliefs regarding racial persecution and conspiracies was the pervasive racism he experienced as a child. Banks, born in 1942, was one of four illegitimate children of a bi-racial couple. R. 1013, 1317. Growing up in an all-white neighborhood in Wilkes-Barre, Pennsylvania, Banks was subjected to racial prejudice from the white and black communities. In school, white students called Banks "black trash" and "half breed," and referred to his white mother as "nigger lover," while black students called Banks "zebra," and his mother "white trash." R. 1014, 1057-60, 1225. Banks quit school in the tenth grade and enlisted in the army at the age of 17.

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[1] Although the court rejected claims raised on direct appeal related to Banks' mental illness, it noted:

> Before we leave the subject of appellant's mental condition, we wish to make it clear that we are aware that appellant suffers and has suffered from a mental defect that contributed to his bizarre behavior both in the courtroom and on September 25, 1982, when thirteen innocent persons were murdered by his hand. His behavior was inexplicable, and his thought-processes remain difficult to comprehend.

Banks I, 521 A.2d at 15-16.

He left the army 19 months later because of racial difficulties, receiving a general discharge under honorable conditions. R. 1319-30.[2]

In August 1969, Banks married Doris Jones, an African American. They had two children, but marital difficulties developed and the parties ultimately separated in October 1976. R. 1062, 1320. Between 1974 and 1979, Banks became involved with four white women: Regina Clemons, Sharon Mazzillo, Susan Yuhas and Dorothy Lyons. Banks fathered five children from these relationships.[3] At trial, family, co-workers and friends described Banks as a loving, caring and protective father. R. 1063-1067, 1092, 1096, 1180-1181, 1207.[4] Banks was particularly concerned about protecting his children from the racism he experienced as a child. R. 1207.[5] He often expressed the view that he would rather see his children dead than exposed to the racial humiliation that he experienced as a child. R. 1210, 1222.

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[2] Banks' mother related that Banks talked about his military service and how a white superior officer would "kick him" and call him "black trash." R. 1061.

[3] Regina Clemens gave birth to Montanzuma in June 1976; Sharon Mazzillo gave birth to Kismayu in 1976; Susan Yuhas, Regina Clemens' sister, gave birth to Bowende in 1978 and Mauritania in 1980; and, Dorothy Lyons gave birth to Foraroude in 1981. R. 1321-22.

[4] Banks' two older children, Montanzuma and Kismayu, attended Catholic school because, as Banks' brother testified, "he [George] wanted to give them the best education he could, and have them grow up with a better opportunity and a better chance in life than what he had." R. 1068, 1098.

[5] A co-worker of Banks testified that Banks had described mounting racial prejudice in the community towards his children to the point where he could not take it anymore. R. 1139. At trial, Banks testified that white neighbors firebombed his house and threw bricks through the windows. Banks and others further testified that white neighbors called his children "niggers" and their mothers were called "nigger lovers," "whores," and "sluts." Complaints to the authorities went unanswered. R. 1207, 1659-60.

Plagued by feelings of insecurity, persecution and anger, Banks did not feel accepted by either whites or blacks, and he viewed himself as "a man without a race." R. 1014,1056-1060, 1086, 1209. Trial testimony indicated that, over time, Banks "developed a persecution complex and became obsessed with the paranoid delusion of imminent international race wars and uprisings." *Banks I*, 521 A.2d at 7.

Beginning in 1976, Banks became convinced that a racial war would erupt. He talked about and wrote numerous stories reflecting his pre-occupation with white supremacy and a racial war in which his male sons would be generals leading an army in a fight against the systematic elimination of Blacks. He prepared for the impending war by stockpiling supplies in remote mountain locations and purchasing an AR-15 rifle. R. 1111-17, 1209, 1219-20, 1245-49, 1269-71, 1484-88, 1491,1624-33.

In February 1980, Banks began working as a prison guard at the Camp Hill Pennsylvania State Correctional Institution. R. 1130. On November 25, 1981, Banks wrote in a journal,

> "I feel that I am insane. I have the impulse to take the shotgun out on the catwalk and kill some inmates. I can't think. I'm writing one word at a time. I beg Allah for help – please. My young children come from play and in vain, they ask for me. What has the white man and his senseless racism done to me? Will I live to see my children grow?" R. 1111.

On September 6, 1982, Banks was relieved from guard duty at the state prison and transported to a mental health facility after telling a fellow guard that, due to depression and other family problems, he wanted "to go to

the tower and blow his brains out." R. 1170, 1194, 1224.[6] Between September 6 and September 24, Banks underwent three mental health evaluations in Wilkes-Barre. R. 1330-33.[7] On September 17, eight days before the shootings, one evaluator noted that Banks was more preoccupied with the racial situation (in Wilkes-Barre and the world) than with any ongoing marital difficulty. R. 1333-36.[8]

On September 24, Banks went to a party with Dorothy Lyons and Regina Clemens. He left the party and returned home where he drank gin and took some pills. He subsequently called Dorothy at the party and told her that he was going to the mountains. He also told her to bring home the AR-15 rifle that was at her sister's house. Dorothy, Regina and Susan Yuhas returned home with the rifle sometime after 1:30 a.m. on September 25. R. 1653-54, 1657-58.

In the early morning hours of September 25, 1982, at their home on Schoolhouse Lane in Wilkes-Barre, Banks shot to death Dorothy Lyons, Regina Clemens and Susan Yuhas, four of his five children and Nancy Lyons, the

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[6] In August, 1982, Banks told co-workers about a custody suit involving Sharon Mazzillo and their son Kismayu and that if he wasn't successful in the suit he would kill his family and himself. He was successful in retaining custody. R. 1158, 1238-41.

[7] Banks also had to undergo a psychiatric re-evaluation by the state prison psychiatrist before returning to work. Banks scheduled the appointment for September 22 and then rescheduled it for the 28th. R. 1337-38.

[8] By September 23, despite previously expressed concerns of family problems, some things were going quite well for Banks. As noted, he had successfully retained legal custody of his son Kismayu. On the 23rd, he met with the state prison board, which approved his transfer to a facility closer to home. Banks sought the transfer for economic reasons. He attended a PTA meeting regarding his children, Kismayu and Montanzuma, and on the 24th, he was notified that a HUD loan had also been approved so he could begin making anticipated repairs to his home. R. 1133, 1253-54, 1279.

daughter of Dorothy. R. 490, 492-93, 496-99, 501-03. Outside his home, he confronted four teenagers and shot two of them, killing one. R. 175-80, 194-97, 221-24.

After stealing a car, he went to Sharon Mazzillo's trailer park. He broke into her trailer and shot to death his girlfriend, Sharon Mazzillo, their son, Kismayu, Sharon's mother, Alice, and her nephew, Scott. Alice's two children were unharmed. R. 1027-28, 1345.

Banks had only a limited recall of these tragic events. He recalled passing out, then waking up in a military flight suit, with a loaded gun and a bandoleer of bullets. He "just started banging away and couldn't control it." It seemed like "something he had to do." R. 1027, 1344-45, 1695-96. Banks then remembered waking up in a ditch, soaking wet, smelling of gunpowder and seeing a figure in the fog. He felt he had been involved in a great deal of violence. R. 1028, 1346.

Police located Banks later that morning barricaded in a friend's house in Wilkes-Barre city. R. 571. During the ensuing standoff, Banks told the police that he killed his children to spare them from the racial prejudice that he experienced as a child. R. 588, 625-26. He repeatedly threatened suicide. R. 544. The police used a fake radio broadcast, which aired that his children were still alive and being treated. This ruse convinced Banks to surrender to police without further incident. R. 629, 1512-13.

On three separate occasions before trial, defense counsel raised the issue of Banks' competency. During the first two hearings, counsel presented psychiatric and lay testimony that Banks could neither assist counsel in relating a reliable, accurate account of the incident, nor understand the object of the criminal proceedings. Defense psychiatrists concluded that Banks had a fixed delusional, paranoid belief that a white police detective had shot and mutilated his family, changed their clothing and body

locations and covered up bullet holes with coroner paste.[9] They further concluded that Banks perceived that the criminal proceedings provided a method to exhume the bodies[10] and thereby prove the existence of a racially motivated conspiracy to fabricate and destroy evidence. R. 3/14/83 at 6-7, 24, 34-37, 41-46, 76, 262-63, 267; R. 5/6/83 at 10, 26-27, 30.[11] The state trial court denied these motions.[12]

After jury selection, trial commenced on June 6, 1983. The state trial court permitted defense counsel, over Banks' objection, to assert an insanity defense. This defense asserted that at the time of the incident Banks held a psychotic belief that he had a right to kill his children to protect them from the racial prejudice he suffered and to insure that they died pure in the hands of God. R. 1028-29. Both the prosecution and defense psychiatrists agreed that, at the time of the incident, Banks was suffering from paranoia psychosis. R. 1024, 1033, 1312-13, 1354, 1826, 1831, 2078-79.[13] Disagreement centered on whether, as a result of his severe mental illness, Banks was able to understand the nature and

[9] Banks believed, for example, that police, motivated by racial hatred, murdered Nancy Lyons to cover-up their killing Fararoude. R. 1666.

[10] Banks had filed a *pro se* motion to exhume the bodies, which the state trial court denied after hearing. R. May 19, 1983, at 110-12.

[11] During the May 14th hearing, Banks testified that he objected to an insanity defense and that he wanted the jury to exhume the bodies. R. May 14, 1983 at 102-106.

[12] The state trial court summarily denied a third competency motion, filed on May 20, 1983. The trial court also summarily denied a motion to withdraw as counsel, which alleged concerns over the trial court's competency determinations.

[13] The version of the *Diagnostic and Statistical Manual of Mental Disorders* in effect at the time of Banks' trial describes the essential feature of this disorder as including "a permanent and unshakable delusional system." *Diagnostic and Statistical Manual of Mental Disorders 3rd Edition* (1980) at 197.

quality of his acts or able to distinguish between right and wrong with respect to those acts. R. 1033, 1349, 1482, 1831, 1874, 2080-81.

During trial, the state court permitted Banks, over the objections of his counsel, to cross-examine witnesses personally, to direct counsel's cross-examination of witnesses, and introduce into evidence photos of the deceased victims, which the court had initially suppressed due to their prejudicial content. R. 445-49, 454-56, 888-89, 1670-82, 1938-40, 2056-58. In addition, a prosecution psychiatrist testified that Banks was psychotic and delusional when he testified, and his trial testimony was, therefore, unreliable. R. 1827, 1832. Despite this conduct, the state trial court summarily denied repeated defense counsel motions challenging Banks' competency. R. 1642-43, 1849-50, 1941-42.[14]

Following presentation of the evidence, the jury convicted Banks of twelve counts of first degree murder, one count of third degree murder, one count of attempted murder, and related charges.

At the sentencing hearing, the Commonwealth sought to prove three aggravating factors under 42 Pa. C.S.A. § 9711(d): that Banks knowingly created a grave risk of death to others (7); that Banks had a significant history of felony convictions involving violence (8); and that he had been convicted of another offense for which a sentence of life imprisonment or death was imposable (10). Defense counsel sought to prove three mitigating factors under § 9711(e): that Banks was under the influence of extreme mental or emotional disturbance at the time of the incident (2); that his ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (3); and, "any other

[14] Because of the introduction of 13 photographs by Banks, which the trial court suppressed, the Commonwealth introduced 38 additional previously suppressed photographs in rebuttal. R. 1947, 1951, 1968, 1979, 1993, 2023, 2029, 2033, 2043, 2045, 2050.

evidence of mitigation concerning the character and record of the defendant and the circumstances of the offense" (8).

In its opening instructions during the sentencing hearing, the court told the jury:

> "The sentence you impose will depend on your findings concerning aggravating and mitigating circumstances. The Crime Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances." J.A. 21.

Later, the Court repeated the substance of this instruction, but substituted the collective pronoun "*you*" for the collective term "the jury" – "if *you* unanimously find . . ." J.A. 26 (emphasis added).

The trial court then listed the potential aggravating factors, telling the jury that the "following matters, if established beyond a reasonable doubt, can constitute an aggravating circumstance," and discussing in detail what the jury would have to consider in deciding whether each circumstance had been so established. J.A. 21-23. The court followed the same procedure with respect to mitigating circumstances, telling the jury that the "following matters, if proven by a preponderance of the evidence, constitute mitigating circumstances," and discussing in detail what the jury would have to consider in deciding whether each mitigating circumstance had been so proven. J.A. 23-25.

The trial court made clear that the jury had to "find" a mitigating circumstance before it could "consider" that circumstance: "If . . . you *find* [defendant's capacity substantially impaired] from a preponderance of the evidence, you may *consider* that a mitigating circumstance." J.A. 25.

The trial court instructed the jury that there were different burdens of proof for aggravating circumstances

(beyond a reasonable doubt) and for mitigating circumstances (by a preponderance of the evidence), but made no other distinction between the manner in which aggravating and mitigating circumstances were to be "found." J.A. 25.

The trial court reminded the jury that its verdict and findings had to be unanimous. J.A. 26. The court then gave a further instruction about how to weigh the aggravating and mitigating circumstances on the "scales of justice," emphasizing that circumstances of both kinds had to be "found" before they could be "place[d] . . . on the scale of justice":

> "A mitigating circumstance, if found to exist, need not outweigh an aggravating circumstance in order to find in favor of life imprisonment. If, after you consider all the evidence and the arguments of counsel, you place the aggravating circumstances you find, if any, on the scale of justice and you weigh them, if, after you do that, the scales of justice are still balanced, then your sentence must be life imprisonment." J.A. 26-27.[15]

The trial court provided the jury with a verdict form that provided, in pertinent part, the following:

> "WE THE JURY HAVE FOUND UNANIMOUSLY . . .
>
> __/__ ONE OR MORE AGGRAVATED CIRCUMSTANCE WHICH OUTWEIGH ANY MITIGATING CIRCUMSTANCE OR CIRCUMSTANCES.

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[15] *See also* J.A. 28: "If you find at least one aggravating circumstance and at least one mitigating circumstance, then you are required by law to weigh them."

THE AGGRAVATING CIRCUMSTANCE(S) (IS) (ARE):

1. ___ IN THE COMMISSION OF THE OFFENSE THE DEFENDANT KNOWINGLY CREATED A GRAVE RISK OF DEATH TO ANOTHER PERSON IN ADDITION TO THE VICTIM OF THE OFFENSE.
2. ___ THE DEFENDANT HAS A SIGNIFICANT HISTORY OF FELONY CONVICTIONS INVOLVING THE USE OF THREAT OR VIOLENCE TO THE PERSON.
3. _/_ THE DEFENDANT HAS BEEN CONVICTED OF ANOTHER FEDERAL OR STATE OFFENSE COMMITTED EITHER BEFORE OR AT THE TIME OF THE OFFENSE AT ISSUE, FOR WHICH A SENTENCE OF LIFE IMPRISONMENT OR DEATH WAS IMPOSABLE OR THE DEFENDANT WAS UNDERGOING A SENTENCE OF LIFE IMPRISONMENT FOR ANY REASON AT THE TIME OF THE COMMISSION OF THE OFFENSE.

THE MITIGATING CIRCUMSTANCE(S) (IS) (ARE):

1. _/_ THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.
2. ___ THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED.
3. ___ ANY OTHER MITIGATING MATTER CONCERNING THE CHARACTER OR RECORD OF THE DEFENDANT OR THE CIRCUMSTANCES OF HIS OFFENSE." J.A. 66-68.

After deliberations, the jury found one aggravating circumstance (multiple murder, 42 Pa. C.S.A. § 9711(d)(10)), and one mitigating circumstance (extreme mental disturbance at the time of the incident, 42 Pa. C.S.A. § 9711(e)(2)), and returned twelve death sentences. Following denial of post-verdict motions, the state trial court formally imposed twelve consecutive death sentences on November 22, 1985.

On direct appeal, Banks asserted that the jury, in imposing a death sentence, did not consider the "mitigating factors" as "evidence of individualization." J.A. 108. The Pennsylvania Supreme Court affirmed the convictions and death sentences on February 13, 1987. *Banks I*. J.A. 70-118. This Court denied Banks' Petition for a Writ of Certiorari on October 5, 1987. *Banks v. Pennsylvania*, 484 U.S. 873 (1987).

In February 1989, Banks filed a post-conviction petition under the *Pennsylvania Post-Conviction Relief Act* ("PCRA"), 42 Pa. C.S.A. § 9541-46. In that petition, Banks alleged that the jury instructions, verdict form and jury poll violated *Mills v. Maryland*, 486 U.S. 36 (1988), by requiring jury unanimity on any mitigating circumstances. On appeal, the Pennsylvania Supreme Court considered and rejected this claim on the merits. *Commonwealth v. Banks*, 656 A.2d 467, 470 (1995) (*Banks II*), *cert. denied*, *Banks v. Pennsylvania*, 516 U.S. 835 (1995) (reprinted, J.A. 119-138).

In March 1996, Banks filed for habeas relief in federal court raising eleven claims, three of which were unexhausted. The district court dismissed the unexhausted claims as procedurally barred and denied the remaining claims on the merits. *Banks v. Horn*, 939 F. Supp. 1165 (M.D. Pa. 1996).

While his appeal was pending in the Third Circuit, Banks filed a second PCRA petition in state court seeking to litigate the three unexhausted claims. The Third Circuit, meanwhile, vacated the decision of the district court

and directed that the district court dismiss the habeas petition without prejudice. The Third Circuit held that the new claims were not procedurally defaulted because Pennsylvania might yet entertain those claims under the state's relaxed waiver doctrine applicable in capital cases. *Banks v. Horn*, 126 F. 3d 206, 214 (3d Cir. 1997).

The state courts rejected Banks' second PCRA petition as untimely pursuant to the one-year time limit that became effective on January 1, 1996 under 42 Pa. C.S.A. § 9545(b). *Commonwealth v. Banks*, 726 A.2d 374, 376 (1999) (*Banks III*). On March 22, 1999, Banks reinstituted habeas proceedings in federal court. The district court dismissed four claims as procedurally barred and denied relief on the remaining claims. *Banks v. Horn*, 63 F. Supp. 2d 525 (M.D. Pa. 1999).

On appeal, the Third Circuit reversed, finding that Banks was entitled to a new sentencing hearing because the jury instructions and verdict slip violated *Mills*. *Banks v. Horn*, 271 F. 3d 527 (3d Cir. 2001) (*Banks IV*). In reaching this determination, the Third Circuit found that a *Teague* retroactivity analysis was not required because the state courts had reviewed the merits of the *Mills* claim. Following denial of rehearing, this Court granted Petitioners' Certiorari Petition and issued a *per curiam* decision reversing judgment and remanding to the Third Circuit to conduct a *Teague v. Lane*, 489 U.S. 288 (1989), analysis. *Horn v. Banks*, 536 U.S. 266 (2002) (*per curiam*) (*Banks V*).

On remand, the Third Circuit conducted a *Teague* retroactivity analysis, and concluded that *Mills* was not a new rule because it was "dictated and compelled" by prior clearly established United States Supreme Court precedent. The Third Circuit also reaffirmed its prior decision that the Pennsylvania Supreme Court had unreasonably

applied *Mills*. *Banks v. Horn*, 316 F. 3d 228, 239 (2003). (*Banks VI*).[16]

Petitioner's filed their Petition for a Writ of Certiorari to this Court raising two issues with respect to the Third Circuit's ruling. On September 30, 2003, this Court granted certiorari.[17]

SUMMARY OF ARGUMENT

Eight months after Banks exhausted his direct appeals, this Court decided *Mills v. Maryland*, 486 U.S. 367 (1988). The Supreme Court of Pennsylvania, on collateral review, applied *Mills* on the merits and held that the jury instructions and verdict slip did not violate *Mills*. (*Banks II*). On habeas, the United States Court of Appeals for the Third Circuit correctly concluded, after conducting a *Teague* retroactivity analysis, that this Court's decision in *Mills* was dictated by *Lockett v. Ohio*, 438 U.S. 586 (1978) and its progeny. (*Banks VI*). Having also concluded that the Supreme Court of Pennsylvania had unreasonably applied *Mills*, the Third Circuit ordered habeas relief as to the sentences of death.

Lockett and its progeny establish a fundamental rule of general application that the Eighth Amendment prohibits any state mandated process that creates a barrier to

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[16] Judge Sloviter agreed with the two-judge majority that consideration of Banks' *Mills* claim was not *Teague*-barred. However, she concluded that the judgment in Banks' case did not become final until 1995 due to Pennsylvania's unique system of capital jurisprudence, and therefore, Banks was entitled to the benefit of *Mills*. *Banks*, 316 F.3d at 254-55 (Sloviter, J. concurring).

[17] *Amicus Curiae*, CJLF, seem to infer that Banks has deliberately delayed the execution of the judgment through years of frivolous appeals. Brief for CJLF as *Amicus Curiae* at 2. No court has ever faulted Banks for the appeals he has litigated nor concluded that he has deliberately evaded the execution of judgment through filing frivolous appeals. The state courts alone took 12 years to decide his appeals on direct and collateral review.

any sentencer considering and giving effect to relevant mitigating evidence in a capital case. A court does not adopt a "new rule" every time it evaluates a capital sentencing process to determine whether a constitutionally prohibited barrier to mitigating evidence exists. Each time this rule is applied to eliminate such barriers, it does not become "new" again simply because the source of the barrier is different. Banks is entitled to the benefit of the *Lockett* rule, which pre-dated the exhaustion of his direct appeals and dictated the result in *Mills*. The application of *Lockett* to a single juror's holdout vote on the existence of mitigating evidence was a necessary result of the *Lockett* principle, and did not create a new rule. Accordingly, Banks is entitled to rely on *Mills*.

Alternatively, Banks is entitled to rely on *Mills* because – under the unique Pennsylvania doctrine of "relaxed waiver" – his conviction was not actually final until the Pennsylvania Supreme Court denied his post-conviction petition in 1995.

Federal habeas courts should permit state courts to determine how "final" their judgments are. *Lefkowitz v. Newsome*, 420 U.S. 283 (1975). The date of finality of the judgment for *Teague* purposes is 1995, when the Supreme Court of Pennsylvania addressed the *Mills* question on collateral review. The application of *Mills* by the state supreme court arose out of that court's exercise of its former "relaxed waiver" doctrine in capital cases. This doctrine had extended the concept of "finality" in capital cases to the post conviction stage. It was more than a procedural default rule. Based upon *Woodson v. North Carolina*, 428 U.S. 325 (1976), the doctrine was designed to insure that a sentence of death was "constitutionally beyond reproach". *Commonwealth v. McKenna*, 383 A.2d 174 (1978).

When the Supreme Court of Pennsylvania undertook to apply *Mills* to this case, its decision was both "contrary to" and "an unreasonable application" of *Mills*. The jury instructions and verdict slip in *Banks* are materially indistinguishable from those in *Mills*. As in *Mills*, it is

reasonably likely that the jury understood the instructions and verdict slip as requiring them to unanimously find a mitigating circumstance before they could weigh that circumstance. The state supreme court failed to understand *Mills* and completely failed to undertake any meaningful analysis to determine whether the instructions and verdict slip violated *Mills*.

ARGUMENT

I. *MILLS* DID NOT ANNOUNCE A NEW RULE

Mills v. Maryland, 486 U.S. 367 (1988), was decided approximately eight months after Banks exhausted his direct appeal. *Banks v. Pennsylvania*, 484 U.S. 873 (1987). Petitioners contend that Banks cannot rely on *Mills* under the "new rule" doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), because Banks' conviction became final before *Mills*, and *Mills* purportedly announced a new rule. Petitioners are wrong.

Teague analysis requires a survey of the legal landscape as it existed when a conviction became final to determine whether then existing precedent dictated the rule on which Respondent relies. *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994).[18] If existing precedent dictates a holding, then it is not a "new rule" for *Teague* purposes. *Teague*, 489 U.S. at 301; *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *rev'd on other grounds, Atkins v. Virginia*, 536 U.S. 304 (2002).[19]

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[18] Under *Teague*, the court must first determine when the state conviction and sentence became final. *Caspari*. As will be discussed below, Banks contends that his conviction and sentence became final in 1995.

[19] There is no requirement that the Supreme Court unanimously adopt a rule in order for its consideration as an "old" rule for *Teague* purposes. *Penry*, 492 U.S. at 351-52 (Scalia, J., dissenting both from the decision on the merits of petitioner's claim, and from the decision that the ruling was upon an "old" rule).

Teague, however, is not a straitjacket. *Teague* does not bar a habeas court from applying settled law to different factual situations. "Where a rule is designed for the purpose of evaluating a myriad of factual contexts, it will be the infrequent case so novel that it forges a new rule, one not dictated by precedent." *Wright v. West*, 505 U.S. 277, 309 (1992). Thus, a rule of law may be sufficiently clear for habeas purposes when expressed in terms of generalized standards rather than as a bright line rule, and the repeated applications of a rule that necessarily require a case-by-case examination of the evidence do not create a "new rule" under *Teague*. *Williams v. Taylor*, 529 U.S. 362, 382 (2000).[20]

When Banks exhausted his direct appeal in 1987, this Court already had decided a series of cases upholding the constitutional requirement of "individualized sentencing" and the indispensable nature of mitigating evidence in capital cases. In *Woodson v. North Carolina*, 428 U.S. 280 (1976), this Court recognized that:

> "A fundamental respect for humanity underlying the Eighth Amendment . . . . requires the consideration of the character and record of an offender as an indispensable part of the process of inflicting the death penalty." *Id.*, at 304.

In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), this Court held that the Eighth Amendment prohibits any barrier which precludes the sentencer "from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the

[20] In *Banks v. Horn*, 316 F.3d 228, 234 (3d Cir. 2003) (*Banks VI*), the Third Circuit, citing *Saffle v. Parks*, 494 U.S. 484, 488 (1990); *Graham v. Collins*, 506 U.S. 461, 467 (1993); *Butler v. McKellar*, 494 U.S. 407, 412-13 (1990); and *Mackey v. U.S.*, 401 U.S. 667, 695 (1971) (Harlan, J. concurring and dissenting in part), reasoned that it is difficult to determine whether a case announces a new rule particularly "when the decision in question merely extends the reasoning of prior cases."

defendant proffers as a basis for a sentence less than death." In *Lockett*, this court struck down a statute that allowed the jury to consider only statutorily enumerated mitigating factors, precluding consideration of any non-statutory factors regarding a defendant's character, background and circumstances of the offense offered as a basis for a sentence of less than death. In the cases that followed *Woodson* and *Lockett*, this Court applied these principles to a myriad of factual contexts. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982) (sentencer's belief that certain evidence may not be weighed in mitigation); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (an evidentiary ruling); and *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (a jury instruction).

These cases establish a fundamental rule of general application – that the Eighth Amendment prohibits any state mandated process that creates a barrier to any sentencer considering and giving effect to relevant mitigating evidence in a capital case. This Court does not adopt a new rule every time it evaluates a capital sentencing process to determine whether a constitutionally prohibited barrier to mitigating evidence exists. The elimination of constitutionally impermissible barriers to the consideration of mitigating evidence is not a new rule under *Teague*. This elimination, dictated by precedent, is to insure compliance with the Eighth Amendment mandate of an individualized assessment of the appropriateness of the death penalty. Thus, *Mills* did not announce a "new rule." Rather, it applied the well-established *Lockett* principle to eliminate a constitutionally impermissible barrier to the consideration of mitigating evidence. Under *Teague*, Banks is "entitled to the benefit," *Penry*, 492 U.S. at 314-15, of both the *Lockett* rule and the specific application of that rule in *Mills*.

This Court's decision in *Penry* also supports the proposition that the elimination of all such barriers is not a "new rule." In *Penry*, this Court further emphasized both the breadth of *Lockett* as an Eighth Amendment doctrine, *and* that the broad application of *Lockett* was dictated by *Lockett* and *Eddings* (the decisions that had been rendered

when Penry's conviction became final on January 13, 1986). *Penry*, 492 U.S. at 314-15. In *Penry,* the defendant sought to persuade the jury to sentence him to life based on evidence, *inter alia*, of mental retardation and an abused childhood. In this Court, Penry contended that the Texas special issues for capital sentencing precluded the jury from being able "to fully consider and give effect to" his mitigating evidence "in answering the three special issues." *Id.* at 315. This Court agreed:

> [A]t the time Penry's conviction became final, it was clear from *Lockett* and *Eddings* that a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from *considering and giving effect* to [relevant mitigating] evidence . . . . The rule Penry seeks – that when such mitigating evidence is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether the death penalty should be imposed – is not a "new rule" under *Teague* because it is dictated by *Eddings* and *Lockett. Id.* at 318-19.

In *Mills*, this Court held that a State may not create a barrier to any juror considering mitigating evidence through a requirement of jury unanimity. *Mills*, 486 U.S. at 384 ("The possibility that a single juror could *block* . . . *consideration* [of mitigating evidence], and consequently require the jury to impose the death penalty, is one we dare not risk"); *see McKoy v. North Carolina*, 494 U.S. 433, 438 (1990) (*Mills* held that "allowing a 'holdout' juror to *prevent* the other jurors from *considering* mitigating evidence violated the principle established in *Lockett*"). It is "*well established*" and "*beyond dispute*" that *any* "barrier to the sentencer's consideration of all mitigating evidence" violates the Eighth Amendment, "*whatever its source* may be." *Mills*, 486 U.S. at 374-75 (citing *Lockett*, *Eddings*, *Skipper*, *Hitchcock*). In *Mills*, this Court simply applied that well established rule to invalidate the barrier created

by a single juror's holdout vote on the existence of mitigating evidence.

The condemned instruction in *Mills* and the *Banks* instruction and verdict slip, as discussed below, govern how a jury deliberates, but they also dictate what evidence a juror or jurors may consider in their sentencing decision. For example, if eleven jurors believed that Banks had established the racial prejudice that he experienced as a mitigating factor, one juror could prevent the eleven from using this factor in their sentencing decision. Such a process creates a constitutionally impermissible barrier to the sentencer's consideration of mitigating evidence. The *Lockett* line of cases dictated the decision in *Mills,* and Banks is entitled to the benefit of those decisions.

Faced with the evident conviction of this Court that the *Lockett* line of cases compelled the result in *Mills*,[21] Petitioners offer various reasons for thinking that *Mills* was a new rule. None of those reasons are convincing.

First, Petitioners assert that the crucial issue in *Mills* was "whether, in the absence of unanimity, individual jurors must be permitted to carry over [their] consideration [of mitigating evidence] from the fact-finding stage into the weighing stage." Brief for Petitioners, at 18.[22] Petitioners seem to believe that was an open issue in 1987. *Penry* and *Hitchcock*, however, make clear that this Court had already answered that question.

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[21] *Mills*, 486 U.S. at 375 (it "*must* be true" that when a "barrier to the sentencer's consideration of all mitigating evidence" results from "a single holdout juror's vote against finding the presence of a mitigating circumstance," the result "would *necessarily* be the same" as in the other *Lockett* cases).

[22] That was not evident to this Court in *Mills.* In *Mills,* this Court thought the answer to that question an easy one, *see Mills*, 486 U.S. at 375; it thought the hard question was whether the instructions and verdict slip used there likely had that effect. *Id.* at 375-76.

In *Penry*, *Lockett* was violated because there was no way for the jury to answer "no" to the special issues (and sentence to life) based on the proffered mitigating evidence. *Penry*, 492 U.S. at 328. In *Hitchcock*, a *Lockett* violation occurred when the jurors received an exclusive list of mitigating factors to consider that did not include all of the factors required by *Lockett*. *Hitchcock*, 481 U.S. at 397-99. In both *Penry* and *Hitchcock*, the jury was allowed to hear the mitigating evidence, and to "consider" whether it was credible and even to "consider" whether because of that evidence the defendant "was not sufficiently culpable to deserve the death penalty." *Penry*, 492 U.S. at 326. However, the juries, in *Penry*, *Hitchcock*, *Mills* and *Banks*, were not allowed to *vote for life* based on the evidence they heard and considered. Accordingly, *Lockett* dictated that all of these restrictions on giving effect to mitigating evidence violated the Eighth Amendment.

That is not surprising, given that *Lockett* and its precursor, *Woodson*, are based on the fundamental principle of individualized sentencing. *Lockett*, 436 U.S. at 604-05; *Woodson*, 428 U.S. at 303-304; *See Zant v. Stephens*, 462 U.S. 872, 879 (1983) ("What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.") (emphasis original); *Tuilaepa v. California*, 512 U.S. 967, 972 (1994) (*Lockett* principle operates at the selection stage). *Lockett* would be a hollow shell if a State could satisfy it by allowing the sentencer to "hear" and "consider" mitigating evidence, while nevertheless barring the sentencer from doing anything meaningful with that evidence. Thus, *Lockett* compelled the result in *Mills*.

Second, Petitioners propose that a highly restrictive application of *Teague* applies to all categories of rules – *i.e.*, that "a rule is new whenever it is the product of reasoned debate rather than indisputable mandate." Brief for Petitioners at 19. Petitioners ignore the fact that

Teague does not treat all categories of rules in the same fashion. In particular, Teague does not bar a habeas court from applying a settled rule of general application to different factual situations. *See*, *Wright*, 505 U.S. at 309. An example of this kind of rule is the *Strickland v. Washington*, 466 U.S. 668 (1984), standard for evaluating ineffective assistance of counsel claims. *See*, *Williams*, 529 U.S. at 390-91 (rule of *Strickland* was clearly established; existing precedent dictated that state court apply *Strickland*); *Wiggins v. Smith*, 123 S. Ct. 2527, 2535 (2003) (Court "made no new law" in *Williams*). The *Lockett* rule is another rule of this type. As indicated above, by 1987 the *Lockett* rule either had been applied or was required to be applied in numerous factual contexts. Moreover, the breath of the *Lockett* rule is also indicated by this Court's consistent citation of it (along with guided sentencing discretion) as one of the two pillars of Eighth Amendment jurisprudence.[23] Because *Lockett* is a rule of general application, the narrower *Teague* rulings cited by Petitioners do not apply – though, even if they did, *Penry* makes clear that the *Lockett* principle dictates *Mills*.

Third, Petitioners acknowledge that, as of the time Banks exhausted his direct appeal in 1987, the *Lockett* line of cases dictated the rule that "the sentencer may not . . . be precluded from considering any relevant mitigating evidence." Brief for Petitioners at 18 (quoting *Mills*, 486 U.S. at 374-75). Relying on *Saffle v. Parks*, 494 U.S. 484 (1990), however, Petitioners contend that *Mills* was a new rule because it dealt with a state restriction on "the **way** the mitigating evidence may be considered," as opposed to a state restriction on "the **kind** of mitigating evidence a

[23] *See, e.g., Romano v. Oklahoma*, 512 U.S. 1, 7 (1994); *McCleskey v. Kemp*, 481 U.S. 279, 302-05 (1987); *Zant v. Stephens*, 462 U.S. at 879 (1983).

jury may consider." Brief for Petitioners at 22 (emphasis in original); *see, Saffle*, 494 U.S. at 490 (distinguishing rules that "govern what factors the jury must be permitted to consider" from rules that "govern how the State may guide the jury in considering and weighing those factors").

Petitioners fail to acknowledge, however, that *Penry* considered and rejected application of such a distinction in precisely the same context as in *Mills*. The failure of Petitioners and *Amicus Curiae*, Criminal Justice Legal Foundation (CJLF), to address *Penry* in any meaningful way is telling. Petitioners utterly ignore *Penry*, while the CJLF argues that *Penry* was wrongly decided. Brief for CJLF as *Amicus Curiae*, at 12-15. Neither makes any argument that *Penry* can be reconciled with their contentions that *Mills* established a "new" rule for *Teague* purposes. In *Penry*, the defendant presented the relevant mitigating evidence, *see Penry*, 492 U.S. at 320; thus, the jury had the opportunity to "consider" that evidence in some fashion. What the Texas special issues did *not* allow Penry's sentencing jury to do was to "give effect" to that evidence "in determining whether death was the appropriate punishment." *Id.*, at 322.

Penry thus makes clear that "how" restrictions that effectively prevent the sentencing jury from "giving effect" to all relevant mitigating evidence *at the selection stage* of the sentencing process were prohibited by *Lockett* before *Mills* was decided, just like "what" restrictions on the evidence the jury can consider. Accordingly, *Penry* further makes clear that the "how" rule of *Mills* – that a single holdout juror may not preclude the rest of the sentencing jury from "giving effect" to mitigating evidence by weighing it at the selection stage – was dictated by existing law as of January 1986. Permitting one or more jurors to force the jury as a whole to impose death through a jury unanimity requirement violates *Lockett*, as was clear at least by 1986 (*Penry's* finality date).

The preclusive effect of a jury unanimity requirement distinguishes *Mills* and *Penry* from *Saffle* and *Walton v. Arizona,* 497 U.S. 639, 649-51 (1990) (state may require defendant to establish mitigating circumstance by preponderance of the evidence). Even though the jury instructions in *Saffle* allowed the jury to consider *and* give effect to his mitigating evidence, the petitioner there sought creation of a rule that he was entitled under *Lockett* to a further clarifying instruction, to the effect that jurors could vote for life based on sympathy engendered by the mitigating evidence. *Saffle,* 494 U.S. at 489. This Court explained why neither *Lockett* nor *Penry* required such a rule:

> "Here, by contrast, there is no contention that the State *altogether prevented* Parks' jury from *considering, weighing, and giving effect* to all of the mitigating evidence that Parks put before them; rather, Parks' contention is that the State has unconstitutionally limited the manner in which his mitigating evidence may be considered. As we have concluded above, the former contention would come under the rule of *Lockett* and *Eddings*; the latter does not." *Saffle,* 494 U.S. at 491.

Accordingly, *Saffle* itself acknowledges that *Mills* prohibits a jury unanimity requirement that operates to prevent the jury from weighing and giving effect to mitigating evidence "would come under the rule of *Lockett* and *Eddings*," unlike the rule in *Saffle*. *Saffle*, 494 U.S. at 491.

Similarly, the burden-of-proof requirement approved in *Walton* merely establishes a threshold for the jury to use in deciding whether the mitigating evidence presented is sufficiently credible to be placed in the weighing process. In contrast, the unanimity requirement – as it operated here and in *Mills* – meant that a single juror (or two or three) could preclude all the other jurors from voting for life even though they were convinced the defendant

established mitigating evidence.[24] *Lockett* dictated the rejection of any such requirement, well before *Mills*. *See Mills,* 486 U.S. at 384.

Fourth, Petitioners contend that *Mills* must have been "new" because, in *McKoy*, four Justices indicated their belief that *Mills* was not "**dictated** by pre-*Mills* precedent." Brief for Petitioners at 19 (emphasis original). That statement is not strictly accurate. In *McKoy*, Justice Kennedy expressed the view that *Mills* did not involve a *Lockett* violation, but rather a violation of the Eighth Amendment principle forbidding arbitrariness in capital sentencing. *McKoy*, 494 U.S. at 452-54 (Kennedy, J., concurring in judgment). The dissenters in *McKoy* asserted that neither *Mills* nor *McKoy* involved a *Lockett* violation, but that it violates the Constitution to instruct a jury that unanimity is required in a state like Maryland (or Pennsylvania) where the statute does *not* require unanimity. *McKoy*, 494 U.S. at 459-60 n.1 (Scalia, J., dissenting). While the concurring and dissenting Justices disagreed with the majority in *Mills* and *McKoy* that *Mills* was dictated by *Lockett*, they left open the possibility that *Mills* was compelled by *other* "pre-*Mills* precedent." In fact, it was.

In *Mills,* this Court, before finding that the jury unanimity requirement violated *Lockett*, determined that "it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty," based on a jury unanimity requirement. *Mills,* 486 U.S. at 374. This Court reiterated that arbitrariness ruling in *McKoy*, 494 U.S. at 440. The conclusion that a jury unanimity requirement is impermissibly arbitrary "fits within," *McKoy*,

[24] In that respect, as discussed in n. 21, *supra*, the effect of the unanimity requirement is identical to the effect of the special issues in *Penry*.

494 U.S. at 454 (Kennedy, J., concurring), and is compelled by this Court's arbitrariness decisions.

II. BANKS' CONVICTION BECAME FINAL IN 1995

In 1995, the Pennsylvania Supreme Court **actually applied *Mills*** in this case, *Banks II,* 656 A.2d at 470-72, albeit in a manner that, as shown in Part III infra, was objectively unreasonable and contrary to clearly established law. The *Banks II* decision resulted from the unique judicial authority of the Supreme Court of Pennsylvania and that Court's exercise of its "relaxed waiver" doctrine in capital cases. Under these unusual circumstances, a critical question was not answered by this Court's decision in *Banks V.* What is the date of finality of the judgment for *Teague* purposes? Under Pennsylvania's doctrine of "relaxed waiver," that date in this case is when the Supreme Court of Pennsylvania addressed the *Mills* question on post conviction review. Therefore, Banks' conviction actually became final in 1995, when the state court decided *Banks II*. "Finality of judgment" for purposes of *Teague* did not occur until then. This determination of finality is consistent with this Court's decision last year directing the Third Circuit to conduct a Teague retroactivity analysis. *Banks V.*[25]

Petitioners assume that Banks' conviction became "final" for *Teague* purposes in 1987, with "final" being defined as occurring at the conclusion of direct appeal.

[25] In *Horn v. Banks*, 536 U.S. 266 (2002), this Court did not have the opportunity to fully examine the unique quality of capital jurisprudence in Pennsylvania, the colonial powers of the Supreme Court of Pennsylvania and the development of the doctrine of "relaxed waiver". The Supreme Court of Pennsylvania has now abolished this doctrine of relaxed waiver at all levels of a capital case. *Commonwealth v. Freeman*, 827 A.2d 385 (2003).

Brief for Petitioners at 12, 14. This position does not recognize Pennsylvania's unique doctrine applicable to capital cases. That doctrine extended the concept of "finality" to the post conviction stage, and permitted the raising of issues at that stage for the first time without regard to any prior default. This doctrine, commonly referred to as the "relaxed waiver rule," was rooted in the Pennsylvania Supreme Court's recognized "duty to uphold the mandates of the Constitution over the countervailing considerations of normal appellate procedure." *Commonwealth v. McKenna*, 383 A.2d 174, 181 (1978). It is not a rule simply governing procedural default but rather was adopted to ensure that the application of the death penalty, which is "irrevocable in its finality," also "be constitutionally beyond reproach," in accordance with this Court's requirement of heightened reliability in capital cases. *Id.*, citing *Woodson*, 428 U.S. at 304-05.[26]

When the Supreme Court of Pennsylvania applied *Mills* in *Banks II*, it applied the "relaxed waiver" doctrine reviewing the constitutional claims raised in the capital PCRA proceedings in exactly the same manner as it would have reviewed the claims on direct review. *Banks II*, 656 A.2d at 470, n. 7. At that time of review, the court adjourned consideration of "normal appellate procedure" and finality in favor of insuring that the sentence of death is constitutionally beyond reproach.

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[26] Enforcement of a rule as unusual as "relaxed waiver" is consistent with the unique position the Pennsylvania Supreme Court holds in that Commonwealth's judicial structure. For example, the Court continues to exercise its power of "the King's Bench", despite the events of July, 1776. *See, e.g. Carpentertown Coal and Coke v. Laird*, 61 A.2d 426 (1948); *In re Assignment of Avellino*, 690 A.2d 1138 (1997). The Court has recently refused to exercise its King's Bench power to resurrect a jurisdictional defect in the late filing of a post conviction petition in a capital case. *Commonwealth v. Fahy*, 737 A.2d 214 (1999).

Under Pennsylvania's "relaxed waiver" doctrine, capital cases did not become "final" at the conclusion of direct appeal. Rather, the court ruled that "Finality of execution" had outweighed any state interest in "finality of the judgment," thus requiring that constitutional claims had to be addressed on their merits in capital cases whenever they were raised. *Commonwealth v. Albrecht*, 720 A.2d 693 (1998). Simply put, conventional notions of finality, as contemplated under *Teague*, did not exist in capital cases in Pennsylvania when it applied the "relaxed waiver" doctrine.

Indeed, this lack of finality had been recognized by the Supreme Court of Pennsylvania in assessing amendments to the *Post Conviction Relief Act* (PCRA), *see, e.g.*, 42 Pa. C.S.A. § 9543(a)(3), and had formed the basis for that Court's decision to abolish the relaxed waiver rule in the collateral appellate context. *Albrecht*, *supra* at 700. *See Commonwealth v. Bracey*, 795 A.2d 935, 956 (2002) (before *Albrecht*, capital case relaxed waiver rule had "prevent[ed] finality in capital cases"); *Commonwealth v. Tilley*, 780 A.2d 649, 654 (2001) (before *Albrecht*, relaxed waiver rule had "virtually eliminated any semblance of finality in capital cases" (quoting *Albrecht*)).

The definition of "finality" cannot always be, as Petitioners suggest, so clearly divorced from comity considerations. While conventional notions of "finality" may come at the conclusion of direct review in cases arising from other jurisdictions, it had not done so here, given Pennsylvania's unique doctrine of "relaxed waiver." The Supreme Court of Pennsylvania had chosen to implement the requirements of its own constitutional and statutory authority when, under its doctrine of "relaxed waiver", it had addressed the merits of the *Mills* claim in *Banks II*. Any suggestion that the action that was taken by the Supreme Court of Pennsylvania was somehow "extracurricular" to a rendering that the judgment was "final" only serves as insult to the manner in which the

highest court of a sovereign state had chosen to implement the requirements of its own constitutional and statutory provisions.

Because the Supreme Court of Pennsylvania did not treat capital convictions as "final" after direct appeal, the federal habeas courts should not impose a more rigid definition of finality. As this Court has explained in a similar context, *see*, *Lefkowitz v. Newsome*, 420 U.S. 283 (1975), federal habeas courts should instead permit a state court to determine how "final" its judgments are.

In *Lefkowitz,* this Court addressed the degree of "finality" that federal habeas courts should afford a guilty plea entered in a New York state court. This Court first noted that "**[i]n most States** a defendant must plead not guilty and go to trial to preserve the opportunity for state appellate review of his constitutional challenges to arrest, admissibility of various pieces of evidence, or the voluntariness of a confession." *Lefkowitz*, 420 U.S. at 289 (emphasis added). In states that have such a requirement, "the State acquires a **legitimate expectation of finality** in the conviction" obtained from a guilty plea, and the federal habeas courts will also treat that guilty plea as final – the defendant cannot bring "constitutional challenges to arrest, admissibility of various pieces of evidence, or the voluntariness of a confession" in federal habeas proceedings. *Id.* (emphasis added).

While this was the finality rule in "most states," New York had a different scheme, which allowed the defendant to plead guilty without waiving "certain types of constitutional claims raised in pretrial proceedings." *Id.* As a result of this unique structure of New York state law, a guilty plea in a New York state court did not create "a legitimate expectation of finality," and there was no barrier to federal habeas review of the defendant's constitutional claims. *Id.* Any other rule would give a guilty plea greater finality in the federal habeas courts than it enjoyed in the state courts, a result that is inconsistent with

federalism and the importance of the writ of habeas corpus. The same result applies here.

Petitioners state that the "Pennsylvania Supreme Court has already ruled, in this very case, that direct review concluded and Banks' conviction became final when the court affirmed it in 1987 and this Court denied certiorari." Brief for Petitioners, at 27 n.14 (citing *Banks III,* 726 A.2d at 375). This is remarkably misleading.

The Pennsylvania Supreme Court "ruling" in *Banks III*, to which Petitioners refer, was decided in 1999, after the Supreme Court of Pennsylvania's 1998 abandonment of the capital case relaxed waiver doctrine. As indicated, the court had abandoned this doctrine for the first time in the post conviction context. This was in response to statutory and jurisprudential considerations of the issue of finality in capital cases. Thus, the statement in *Banks III* about "finality" says nothing about how the state court defined finality during the reign of relaxed waiver, when it decided *Banks II* and addressed the *Mills* claim. Moreover, the statements in *Banks III* about "finality" are based entirely upon the statutory language of the 1996 amendments to the PCRA – amendments that post-date and did not apply to the decision in *Banks II*.[27] The *Banks III* court

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[27] In *Banks III,* the court's statement about "finality" was based solely upon the following quotation from amendments to the PCRA that were enacted on November 17, 1995 and became effective sixty days thereafter:

"42 Pa. C.S.A.§ 9545. Jurisdiction and proceedings . . .

(b) Time for filing petition.

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the **judgment becomes final** . . . .

(3) **For purposes of this subchapter**, a **judgment becomes final** at the conclusion of direct review, including discretionary review in the Supreme Court of the United

(Continued on following page)

stated that under these 1996 amendments to the PCRA: "The Legislature has spoken on the requisites of receiving relief under the PCRA and has established a scheme in which PCRA petitions are to be accorded finality." *Banks III,* 726 A.2d 376. Thus, after abolition of the relaxed waiver doctrine, and the enactment of these 1996 amendments to the PCRA, Pennsylvania now deems its capital cases "final" at the conclusion of direct appeal. At the time of *Banks II*, however, it did not.

The CJLF asserts that "this Court used the usual definition [of finality] in identical circumstances in *Sawyer v. Smith*, 497 U.S. 227 (1990)," where the Court held that *Caldwell v. Mississippi*, 472 U.S. 320 (1985), announced a "new rule" under *Teague*. Brief for *Amicus Curiae*, CJLF, at 3 n.2. There are two flaws in CJLF's arguement.

First, there is no suggestion in *Sawyer* that either party questioned the finality date in that case, and this Court did not address the issue. Thus, even assuming that *Sawyer* and *Banks* confronted "identical circumstances," this Court in *Sawyer* did not decide the issue presented here. Second, CJLF errs when it says *Sawyer* and *Banks* were identical. There is a significant difference between them. As stated above, *Sawyer* concerned the retroactivity of *Caldwell v. Mississippi*. The *Sawyer* petitioner raised the *Caldwell* claim in state post-conviction proceedings. However, there is **no** indication in the *Sawyer* state court opinions that the state courts actually applied *Caldwell* to the claim. See *Sawyer*, 1990 WL 10023010, *72aa-*93aa (March 6, 1990) (state court opinions). In *Banks II*, the state courts addressed *Mills*, but Petitioners and CJLF, now ask this court to ignore that state court decision.

States and the Supreme Court of Pennsylvania, or expiration of time for seeking the review. (emphasis added).

Banks III, 726 A.2d at 375 (quoting 42 Pa. C.S.A. § 9545(b)(1), (3)).

The purpose of *Teague* is to protect state courts from being blindsided by the application of new rules that were not available to them. *Teague's* purpose is fulfilled when the federal court uses exactly the same precedent as the state court. Just as "[i]t would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law," *Stringer v. Black*, 503 U.S. 222, 235 (1992) (citing *Teague*), it would be a "strange rule" to show "respect" for a state court judgment by barring the federal court from applying the same precedent that was applied by the state court. In *Stringer*, this Court confirmed that the federal habeas courts, under *Teague,* could apply the same precedent applied by the state court:

> "Insofar as our new rule jurisprudence "validates reasonable, good-faith interpretations of existing precedents," *Butler v. McKellar*, 494 U.S., at 414, 110 S.Ct., at 1217, . . . the State may have little cause to complain if in deciding to allow a petitioner to rely upon a decision the federal courts look only to those precedents which the state courts knew at the relevant time." *Stringer*, 503 U.S. at 236.

As this Court has stated, the state court "is the primary beneficiary of the *Teague* doctrine." *Stringer*, 503 U.S. at 237. Therefore, when the state court considers itself to be "bound by" Supreme Court precedent, the federal habeas courts do not violate *Teague* when they apply that same precedent. *Id.* Thus, under the unusual circumstances of this case, *Mills* applies because finality of judgment for *Teague* purposes occurred in 1995, well after the *Mills* decision.

III. THE PENNSYLVANIA SUPREME COURT'S DECISION WAS CONTRARY TO, AND AN UNREASONABLE APPLICATION OF, *MILLS V. MARYLAND* AND OTHER CLEARLY ESTABLISHED PRECEDENTS OF THIS COURT.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs this case. To be entitled to relief under AEDPA, Banks must show that the state court's rejection of the claim was "contrary to" or an "unreasonable application of" clearly established precedent of this Court. 28 U.S.C. § 2254(d)(1).

Under the AEDPA, "A state-court decision will . . . be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases," *Williams v. Taylor*, 529 U.S. 362, 405 (2000), or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Id.* at 406. "[W]hen a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case, . . . the state-court decision falls within that provision's 'unreasonable application' clause." *Id.* at 409.

Here, Banks shows both that the state court decision was contrary to *Mills* and related decisions of this Court, and that it was an unreasonable application of that clearly established law.[28]

[28] The Pennsylvania Supreme Court decided the *Mills* claim in 1995. J.A. 119, 122-24. That is the relevant date for AEDPA purposes. *Lockyer v. Andrade*, 123 S. Ct. 1166, 1172 (2003); *Williams v. Taylor*, 529 U.S. 362, 412 (2000). **All** of the decisions relied on by Banks were "clearly established" as of 1995.

A. The Facts of This Case Are Materially Indistinguishable From *Mills*, but the State Court Arrived at a Different Result.

In *Mills,* this Court reviewed a death sentence based on jury instructions and a verdict form that arguably required the capital sentencing jury to find mitigating circumstances unanimously before it could weigh those circumstances against the aggravating circumstances in making its decision whether to sentence to life or death.

This Court reached two conclusions in *Mills*. First, this Court decided that there was a "substantial probability that reasonable jurors" would have believed that they "were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Mills*, 486 U.S. at 384.[29] Second, this Court concluded that, under its prior Eighth Amendment decisions, the "possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk." *Id.* If the facts of a case are materially indistinguishable from those which this Court relied on in reaching the former conclusion, then a denial of relief is "contrary to" *Mills.*

The facts of *Banks* are indeed materially indistinguishable from those on which this Court relied in *Mills*. We here set out the facts relied on in *Mills*, together with the parallel facts of *Banks*.

1. Under the Maryland capital sentencing statute, as construed by the Maryland Court of Appeals, each juror was free to decide for himself or herself whether the

[29] This Court has since clarified that the correct question is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990).

defense had established a mitigating circumstance. Each juror could then weigh the circumstance(s) that he or she found against the aggravating circumstances, and a death sentence could not be rendered unless all jurors agreed that the aggravating circumstances outweighed the mitigating circumstances. *Mills,* 486 U.S. at 372 (discussing *Mills v. State*, 310 Md. 33, 54, 527 A.2d 3, 13 (1987)). Despite the fact that Maryland law so provided, it was not clear whether a "reasonable jury" would have understood this aspect of Maryland law "from the instructions given by the trial judge and from the verdict form" provided. *Mills*, 486 U.S. at 375-76.

Like the Maryland Court of Appeals, the Supreme Court of Pennsylvania has interpreted Pennsylvania's capital sentencing statute as not requiring jury unanimity for finding mitigating circumstances. *See*, J.A. 124; *Commonwealth v. Frey,* 554 A.2d 27 (1989). While Maryland and Pennsylvania law are identical in that respect, the issue here – as in *Mills* – is what a reasonable jury would have understood from the instructions and verdict sheet.

2. Under Maryland law, if the jury finds one or more aggravating circumstances, it must impose the death sentence unless it also finds one or more mitigating circumstance(s), and that the mitigating circumstance(s) are not outweighed by the aggravating circumstance(s). *See*, *Mills*, 486 U.S. at 373-75. Thus, by refusing to find any mitigating circumstance(s), a single juror could force the jury to impose death, if the jury understood that a unanimous vote was required to find a mitigating circumstance.

Under Pennsylvania law, as under Maryland law, if no mitigating circumstances are "found," the jury must sentence the defendant to death, and the jury may weigh only those circumstances that it "finds." *Blystone v. Pennsylvania*, 494 U.S. 299, 302-05 (1990) (citing 42 Pa. C.S.A. § 9711(c)(1)(iv)). Thus, as in Maryland, if the jury understood that it must be unanimous to "find" a mitigating

circumstance, a single juror could compel a death sentence by refusing to find any mitigating circumstances, or preclude the remainder of the jury from weighing any circumstances that juror did not "find."

3. In *Mills*, the trial court did not expressly instruct the jurors that they had to be unanimous in order to find a mitigating circumstance – and thus to weigh it against the aggravating circumstance(s).[30] As this Court explained, *Mills,* 486 U.S. at 377-80, there were, however, numerous aspects of the instructions and verdict form that reasonably gave rise to such an impression. In *Banks*, as in *Mills,* the instructions and verdict sheet did not expressly tell the jurors that they had to be unanimous in order to find a mitigating circumstance, but they nevertheless reasonably gave rise to that impression, for precisely the same reasons relied on by this Court in *Mills*.

a. The instructions in *Mills* regarding aggravating circumstances clearly indicated that there were two choices: check off "yes" if there was unanimous agreement that the circumstance in question had been established beyond a reasonable doubt; or check off "no." Except for the fact that there was a different burden of proof (preponderance of the evidence), the instructions and form regarding mitigating circumstances were identical. *Mills*, 486 U.S. at 378. Unanimity was clearly required to find aggravating circumstances. The instructions and verdict

[30] Indeed, the Maryland Court of Appeals construed the instructions and verdict sheet as allowing the jury to weigh any mitigating circumstances that were not unanimously rejected by the jury, *Mills v. State*, 310 Md. 33, 54-56, 527 A.2d 3, 13-14 (1987), as did the dissenting Justices in this Court. *Mills*, 486 U.S. at 394 (Rehnquist, C.J., dissenting). The Pennsylvania Supreme Court has given its sentencing statute a similar construction. *See, e.g.*, *Commonwealth v. Hackett*, 627 A.2d 719, 725 (1993). Contrary to the Commonwealth's argument, *see* Brief for Petitioners at 37, this fact does not establish the reasonableness of the state court's decision. Rather, it is one more way in which the *Banks* statute, jury instructions and verdict sheet mirror those reviewed by this Court in *Mills*.

form used the same language with respect to finding mitigating circumstances as those for finding aggravating circumstances. These facts raised the inference that unanimity was also required to find mitigating circumstances.

The jury instructions and verdict form in *Banks* are materially indistinguishable. The *Banks* jury instructions and verdict form required the jury to be unanimous in order to find an aggravating circumstance, and that if the jurors were not unanimous as to an aggravating circumstance, they could not find or weigh it. *See,* J.A. 21 (death sentence "if the jury unanimously finds" an aggravating circumstance and no mitigating circumstance, or one or more aggravating circumstances that outweigh any mitigating circumstances); J.A. 26 (death sentence "if you unanimously find" an aggravating circumstance and no mitigating circumstance, or one or more aggravating circumstances that outweigh any mitigating circumstances); J.A. 26 ("[P]lace the aggravating circumstances you find, if any, on the scale of justice and . . . weigh them"); J.A. 66 (verdict sheet: "WE THE JURY HAVE FOUND UNANIMOUSLY . . . . ONE OR MORE AGGRAVATED CIRCUMSTANCES WHICH OUTWEIGH ANY MITIGATING CIRCUMSTANCE OR CIRCUMSTANCES.").

The instructions and verdict form with respect to mitigating circumstances – here as in *Mills* – were precisely the same as those for aggravating circumstances (aside from the different burden of proof for mitigating circumstances). The court opened its instructions as follows:

> "The sentence you impose will depend on your *findings* concerning aggravating and mitigating circumstances . . . . [T]he verdict must be a sentence of death if the jury *unanimously finds* at least one aggravating circumstance and no mitigating circumstance, or if the jury *unanimously finds* one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances." J.A. 21; *see,* J.A. 26 (repeating the substance of this instruction, but substituting the collective pronoun "you" for the collective term "the jury" – "if *you* unanimously find . . . .").[31]

This instruction coupled aggravating and mitigating circumstances in emphasizing the importance of "your findings concerning aggravating and mitigating circumstances"; twice stated that such findings had to be unanimous; and made no distinction between the manner in which aggravating and mitigating circumstances were to be "found."

The trial court instructed the jury that there were different burdens of proof for aggravating circumstances (beyond a reasonable doubt) and for mitigating circumstances (by a preponderance of the evidence). J.A. 25. Other than the differing burdens of proof, the instructions made no distinction between the manner in which aggravating and mitigating circumstances were to be "found."[32]

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[31] In these two instructions, the trial court equated the unanimous jury with the collective pronoun "you." Indeed, throughout its charge the court used the collective pronoun "you" to refer without distinction to the entity that sentences, finds aggravating circumstances, and finds mitigating circumstances. *e.g.,* J.A. 21 ("your findings concerning aggravating and mitigating circumstances"); J.A. 23 ("Do you find, from the evidence" a mitigating circumstance?); J.A. 25 ("If [petitioner's capacity was substantially impaired], and you find that from a preponderance of the evidence, you may consider that a mitigating circumstance"); J.A. 26 ("A mitigating circumstance, if found to exist"); J.A. 27 ("if you find the existence of one or more aggravating circumstance and one or more mitigating circumstance"); J.A. 28 ("If you find at least one aggravating circumstance and at least one mitigating circumstance"); J.A. 29 ("In order to find a mitigating circumstance, you must be satisfied that it has been established"); J.A. 30 ("If you find, . . . that there is one or more mitigating circumstances"); J.A. 30 ("the mitigating circumstance or circumstances that you have found"). This consistent use of the collective pronoun "you" strongly suggested that the same body, i.e., the jury-as-a-unanimous-whole, was to find aggravating circumstances, find mitigating circumstances, weigh them, and render the ultimate verdict.

[32] A reasonable jury would infer from the fact that the only stated difference between finding aggravating and mitigating circumstances

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Finally, the trial court instructed the jury that it was to weigh "on the scale of justice" the "found" aggravating circumstances against any "found" mitigating circumstances:

> A mitigating circumstance, *if found to exist*, need not outweigh an aggravating circumstance in order to find in favor of life imprisonment. If, after you consider all the evidence and the arguments of counsel, you *place the aggravating circumstances you find, if any*, on the scale of justice *and you weigh them*, if, after you do that, the scales of justice are still balanced, then your sentence must be life imprisonment. J.A. 26-27.[33]

The instructions clearly told the jurors they had to be unanimous to find aggravating circumstances; that they had to find aggravating circumstances to weigh them; and that they had to find mitigating circumstances to weigh them. The only logical conclusion, as in *Mills*, is that the jurors had to be unanimous to find mitigating circumstances, just like aggravating circumstances.

b. The *Mills* verdict sheet used a check-off form, which gave the jury the options of checking "yes" (if the jury unanimously agreed that an aggravating or mitigating circumstance had been proved) or "no." The jury was not given any other option, leaving the impression that anything less than unanimity should result in checking the "no" box. Although, theoretically, checking "no" could

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was the different burden of proof that the burden of proof was in fact the only difference between the two. *See, Mills*, 486 U.S. at 378.

[33] This instruction (the substance of which was repeated at J.A. 30) does not make sense unless the jury weighs only those mitigating circumstances that it unanimously finds. Otherwise, each juror would have to have his or her own individual balancing scale, with the aggravating circumstances unanimously found on one side and the mitigating circumstances found **by that juror** on the other. The instruction, however, clearly indicates that there is but one scale for the entire jury, reinforcing the idea that mitigating circumstances must be unanimously found before they could be weighed.

indicate affirmatively that the jury had unanimously rejected the circumstance, a reasonable jury could also infer that "no" meant anything other than a unanimous "yes." *See Mills*, 486 U.S. at 378. And if the jury did not check "yes," it could not weigh the circumstance. "Nothing in the verdict form or the judge's instructions even arguably is construable as suggesting the jury could leave an answer blank and proceed to the next [weighing] stage in its deliberations." *Id.* at 378-79.

As in *Mills*, the *Banks* verdict sheet used a check-off form. The slight differences between the two forms made the unanimity requirement even more clear in *Banks*.

The *Banks* verdict sheet gave jurors the options of checking that they had found a circumstance, or leaving the space blank. They were only to check an aggravating or mitigating circumstance if they had found it unanimously. They could only weigh those circumstances that they checked. Instead of having options of "unanimous yes," "unanimous no," and possibly something in between (the *Mills* form), they had the options of "unanimous yes" or nothing. The obvious inference is that they could only check and weigh those mitigating circumstances that the jurors found unanimously.

c. The *Mills* instructions and verdict sheet could be construed as telling the jurors to weigh only those aggravating or mitigating circumstances marked "yes," as found by the unanimous jury. *Id.* at 380.

The *Banks* verdict sheet made this at least as clear as the *Mills* sheet, by the following language, which explicitly requires unanimity:

> WE THE JURY HAVE *FOUND UNANIMOUSLY* . . .
>
> ✓ ONE OR MORE AGGRAVATING CIRCUMSTANCE WHICH OUTWEIGH ANY MITIGATING CIRCUMSTANCE OR CIRCUMSTANCES.

THE AGGRAVATING CIRCUMSTANCE(S) (IS) (ARE):

3. ✓ THE DEFENDANT HAS BEEN CONVICTED OF ANOTHER FEDERAL OR STATE OFFENSE, ...

THE MITIGATING CIRCUMSTANCE(S) (IS) (ARE):

1. ✓ THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

J.A. 66-68.[34]

There simply is no other logical conclusion from this verdict sheet (together with the instructions) than that mitigating circumstances, like aggravating circumstances, were to be "found," checked off, and weighed only if they were circumstances that "WE THE JURY HAVE FOUND UNANIMOUSLY," and that all mitigating circumstances *not* found unanimously were not to be considered "found," not to be checked off, and not to be weighed.[35]

[34] Throughout the verdict sheet aggravating and mitigating circumstances are treated identically. Thus, the verdict sheet provides spaces for the jury to mark: (1) which aggravating circumstance(s) it has found; (2) which mitigating circumstance(s) it has found; (3) whether the aggravating circumstances outweigh the mitigating circumstances; and (4) whether the sentence is death or life. To use the sheet in a constitutionally appropriate manner, the jury would have to know that (1), (3) and (4) could be marked only by unanimous agreement, but that (2) should be marked even if only one juror believes it should be. It is highly unlikely that the jury would arrive at such an irrational understanding of the verdict sheet.

[35] CJLF argues that the verdict sheet requires unanimity "only with regard to the ultimate issue." Brief of *Amicus Curiae*, CJLF, at 28. A lawyer could parse the verdict sheet in that fashion. But to do so would require closing his or her eyes to the undoubted fact that the unanimity requirement applied at least to aggravating circumstances, as well as to the "ultimate issue." Moreover, from the outset of the instructions, the trial judge emphasized the importance of the jury's findings. *See*, J.A. 21. After recording its decision as to the "ultimate issue," the jury was required to record its findings as to aggravating and mitigating circumstances. J.A. 67-68. The jury did so by placing a check mark next to each aggravating and mitigating circumstance that

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4. Finally, immediately after issuing its decision in *Mills*, the Maryland Court of Appeals promulgated a new verdict form that eliminated the ambiguity as to the jury unanimity requirement, and made clear that, if jury unanimity could not be reached as to the mitigating circumstances, individual jurors could weigh those mitigating circumstances which they found had been established by a preponderance of the evidence. *Id.*, at 381-82 (quoting Md. Rule Proc. 4-343(3) (amended July 27, 1987). This Court inferred that the amendment to the verdict form reflected "at least some concern" on the part of the Maryland Court of Appeals as to jury confusion about the unanimity requirement. *Mills*, 486 U.S. at 382.

After this Court's decision in *Mills*, the Pennsylvania Supreme Court took precisely the same action, as had the Maryland Court of Appeals. On February 1, 1989, the Pennsylvania Supreme Court adopted a new Rule of Criminal Procedure (Rule 358A, since renumbered Rule 807), which contains a verdict form that states:

> The aggravating circumstance(s) unanimously found (is)(are):
>
> The mitigating circumstance(s) **found by one or more of us** (is)(are)
>
> * * *

No such verdict sheet was used in the instant case.

Similarly, Pennsylvania Standard Criminal Jury Instruction 15.2502H now specifically instructs the jury that "each of you is free to regard a particular mitigating circumstance as present despite what other jurors may believe." No such instruction was provided here.

As in *Mills*, the changes in the instructions and verdict slip indicate "at least some concern . . . that juries

it found. The logical understanding of the form is that in doing so, the jury was checking those circumstances that "WE THE JURY HAVE FOUND UNANIMOUSLY." J.A. 66.

could misunderstand" the prior instructions and verdict slip employed in *Banks*. *See Mills*, 486 U.S. at 382

Because the operative facts of *Mills* and of *Banks* are materially indistinguishable, the Supreme Court of Pennsylvania's rejection of Banks' *Mills* claim was contrary to *Mills*. Hence, § 2254(d) does not preclude the relief granted by the court below.

B. The State Court Decision Was an Objectively Unreasonable Application of *Mills*.

When a state court's application of this Court's precedent is "objectively unreasonable," § 2254(d) "pose[s] no bar to granting [the] petitioner habeas relief." *Wiggins v. Smith*, 123 S. Ct. 2527, 2539 (2003). Here, while the Supreme Court of Pennsylvania gave lip service to this Court's decision in *Mills*, its decision reveals an utter failure to understand and apply *Mills*, resulting in an objectively unreasonable denial of relief.

This Court's decision in *Mills*, together with its subsequent decision in *Boyde*, makes clear that the focus of a court reviewing a *Mills* claim must be on the jury's understanding of the jury instructions and verdict sheet. In *Mills* itself, this Court emphasized that the "critical question" before it was how a "reasonable jury" would have understood "the instructions given by the trial judge and . . . the verdict form employed in this case." *Mills*, 486 U.S. at 375-76. This Court paid little attention to the Maryland capital sentencing statute, which had been construed by its high court "in a manner that preserves its constitutionality." *Id.* at 369.

The longstanding principle that jury instructions must be considered in their entirety was implicit in *Mills* itself. *Id.* at 375-76. In *Boyde*, this Court explicitly applied the "familiar rule" that a "single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Boyde*, 494 U.S. at 378 (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973)). *Boyde* further clarified that "the proper inquiry in such a case is whether there is a reasonable likelihood that the

jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380.

Thus, *Mills* and *Boyde* together establish that a court reviewing a *Mills* claim must consider the jury instructions and verdict sheet as a whole, in order to determine whether there is a reasonable likelihood that the instructions and verdict sheet led the jury to believe that they were required to unanimously find a mitigating circumstance before they could weigh that circumstance. The Supreme Court of Pennsylvania completely failed to undertake such an analysis.

With respect to the trial judge's instructions, the Supreme Court of Pennsylvania quoted three sentences of the instruction, and then stated:

> "This instruction, which mirrors the language found in the death penalty statute of our Sentencing Code, has previously been reviewed by this Court and determined not to violate *Mills*. *Commonwealth v. Hackett*, 627 A.2d 719 (1993); *Commonwealth v. Marshall*, 633 A.2d 1100 (1993); *Commonwealth v. O'Shea*, 567 A.2d 1023 (1989), *cert. denied*, 498 U.S. 881 (1990). Accordingly, appellant's claim with respect to the instruction is without merit." J.A. 123-24 (quoting J.A. 21).

The three decisions cited by the state court – *O'Shea*, *Hackett* and *Marshall* – all ultimately rely on the court's earlier decision in *Commonwealth v. Frey*, 554 A.2d 27 (1989).[36] In *Frey*, the court held that the jury instructions did not violate *Mills* because they were not identical to those given in *Mills* and because a sentence from the instructions "closely followed" the language of the capital sentencing statute, which it found to be constitutional. *Id.*

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[36] *See O'Shea*, 567 A.2d at 1036 (citing *Frey*); *Hackett*, 627 A.2d at 725 (citing *O'Shea* and *Frey*); *Marshall*, 567 A.2d at 1111 (citing *O'Shea* and *Frey*).

554 A.2d at 31. Thus, in *Frey*, the court asserted that because the statute was constitutional, and part of the instructions tracked the language of the statute, the instructions must be constitutional – but without ever examining the instructions as a whole to determine whether there was a reasonable likelihood that the jury understood the instructions as requiring unanimity.

The state supreme court elaborated on its misunderstanding of *Mills* in *Hackett*:

> "*Mills* concerned a Maryland *statute*, which required jurors unanimously to agree on each individual mitigating circumstance after deciding aggravating factors. Absent unanimous agreement, the Maryland *statute* barred consideration of the mitigating evidence as to a given circumstance. The Supreme Court held that the *statute* violated the Eighth Amendment because a single Maryland juror could force a death verdict on the other jurors by refusing to agree that mitigation existed.
>
> The Pennsylvania *statute*, 42 Pa. C.S.A. § 9711, does the opposite and, therefore, does not violate the rule in *Mills*. The Pennsylvania *statute*, 42 Pa. C.S.A. § 9711(c)(1)(iv), requires that the jury unanimously agree that no mitigating circumstances exist and unanimously agree on a verdict for a sentence of death. Thus, while a single Pennsylvania juror can always prevent a death sentence, a single juror can never compel one, as could a single juror under the former Maryland *statute*."

Hackett, 524 Pa. at 222-23, 627 A.2d at 725 (emphasis supplied) (footnote omitted).

In *Banks*, as in *Frey* and *Hackett*, the court found that the instructions were unobjectionable because a few sentences from the instructions "mirror" the language found in the death penalty statute of our Sentencing Code." (*Banks II*) J.A. 124. According to the Supreme Court of Pennsylvania, review of a *Mills* claim requires

only a simple syllogism: the statute, as we have interpreted it, does not require jury unanimity and is therefore constitutional; some language in the jury instructions "mirrors" or "closely follows" that of the statute; *ergo*, the instructions are constitutional.[37]

Of course, all of this is antithetical to *Mills*. Contrary to *Hackett*, the Maryland *statute*, like the Pennsylvania *statute*, was constitutional, because each high court had adopted a "plausible" construction of the statute as not requiring jury unanimity. *See Mills*, 486 U.S. at 370. But because that "plausible" construction of the statute "may not have been evident to the jury," *Id.* The "critical question," here as in *Mills*, was whether a "reasonable jury could have" concluded from the instructions as a whole that unanimity was required to find a mitigating circumstance. *Id.* at 375-76. *The Supreme Court of Pennsylvania never asked that "critical question."*. As the Third Circuit found, the Supreme Court of Pennsylvania "failed to analyze the penalty phase of Banks' trial in accordance with [the principles of *Mills* and *Boyde*], and, as a consequence, unreasonably applied *Mills*." *Banks II*, Pet. App. at 106.

With respect to the *Banks* verdict sheet, the state supreme court again relied on the assertion that the verdict sheet was "virtually identical" to the one in *Frey*. J.A. 124. As a factual matter, that assertion was inaccurate.[38] As with the Supreme Court of Pennsylvania's

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[37] The Maryland high court's analysis in *Mills* was very similar. According to the Maryland high court, the Maryland statute required jury unanimity only for the final sentencing determination, not for the findings as to mitigating circumstances, and "the [verdict] form and the instructions were entirely in accord with" the statute. *Mills v. State*, 310 Md. 33, 54-56, 527 A.2d 3, 13-14 (1987).

[38] The *Frey* verdict sheet was materially indistinguishable from the one reviewed in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991). *See Frey v. Fulcomer*, 132 F.3d 916, 924 (3d Cir. 1997). The *Zettlemoyer/Frey* verdict sheet did not require the jury to list mitigating circumstances found, but only the aggravating circumstances found.

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review of the jury instructions, its failure to confront the actual verdict sheet and determine how a reasonable jury could have understood it was an objectively unreasonable application of *Mills*.

The state supreme court's decision was not simply wrong. As set forth in Part A, *supra*, the facts of this case are "materially indistinguishable" from those in *Mills*. Alternatively, any conceivable distinctions that can be drawn between this case and *Mills* are so minor that it would be objectively unreasonable for a court that actually reviews the jury instructions and verdict sheet in their entirety to reach any conclusion other than the one reached by the court below – that the instructions and verdict sheet violate *Mills*.

In its brief asserting the reasonableness of the state court's decision, the Petitioners largely ignore both that decision and the language of the jury instructions and verdict slip, in favor of hyperbolic attacks on the court below. *See, e.g.*, Brief for Petitioners at 30 ("caprice"); at 31 (Third Circuit's "effort to appear in compliance with AEDPA"); at 34 (accusing the court below of being motivated by a desire to "provide the appearance of compliance with the AEDPA deference standard"); at 35 (Third Circuit's "tergiversation on *Mills*").[39] Those attacks are unfounded.[40] More to the point, they are irrelevant – whether

Zettlemoyer, 923 F.2d at 308. As discussed above, however, the *Banks* verdict sheet requires the jury to list the mitigating circumstances that "WE THE JURY HAVE FOUND UNANIMOUSLY." J.A. 66, 68. Thus, contrary to the Commonwealth's assertion, Brief for Petitioners at 39, the *Banks* instructions and verdict sheet are not "identical" to those in *Zettlemoyer*; those in *Banks* result in a clear violation of *Mills*.

[39] "Tergiversation" is defined as "1. subterfuge; evasion. 2. desertion."

[40] For example, the Petitioners discourse at length on its view that the Third Circuit ignored this Court's decision in *Boyde*. Brief for Petitioners at 35-37. In fact, the Third Circuit discussed *Boyde* at length, *twice* setting forth the *Boyde* standard in full, Pet. App. 109 (stating the standard), 115 (finding the standard violated), citing

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or not the Third Circuit committed apostasy or subterfuge has nothing to do with whether the state court's decision was an objectively unreasonable application of *Mills*.

The Petitioners' principal argument on the actual merits of the AEDPA issue is that the jury instructions should be read as instructing "that the jury must be unanimous to *reject* any mitigating circumstances." Brief for Petitioners at 30 (emphasis original); *Id.* at 31. In making this contention, Petitioners rely on the emphasis it places on a single word in the instructions: "the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and **no** mitigating circumstances, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances." Brief for Petitioners, at 30 (quoting J.A. 21).

According to the Petitioners, the only reasonable understanding of the coupling of "unanimously finds" and "no mitigating circumstance" in this instruction is that it told the jurors that they must be unanimous to reject mitigating circumstances, not to find them. The Petitioners' argument strains credulity.

The sentence quoted by the Petitioners also couples "unanimously finds" with "at least one aggravating circumstance" and with "any mitigating circumstance or circumstances." There is no question that the instructions conveyed that the jury must be unanimous to find an aggravating circumstance. Given the parallel language, it would certainly be at least reasonable for a jury to understand that it must be unanimous to find a mitigating

numerous times, Pet. App. 105, 108-09, 115, and applying it. Given that the Third Circuit stated and applied *Boyde's* reasonable likelihood standard, its occasional use of the shorthand "could" for the likely effect of the instructions on a reasonable jury is of no moment. While this Court noted in *Boyde* that "there may not be great differences among the [ ] various phrasings," *Id.* at 379, of the standard, the Third Circuit clearly understood and applied *Boyde's* clarification of *Mills*.

circumstance, and *not* to construe "unanimously *finds* . . . *no* mitigating circumstance" as meaning "unanimously *rejects* . . . *all* mitigating circumstances," which is what Petitioners contend the language means.

Like the Supreme Court of Pennsylvania, the Petitioners concentrate on a single sentence from the jury instructions. When the instructions are viewed in their entirety, as discussed in Part A, *supra*, it is clear that a reasonable jury could understand them as requiring jury unanimity to find mitigating circumstances.

The Petitioners also appear to argue that there cannot be a *Mills* violation because the instructions and jury sheet do not expressly require jury unanimity. Brief for Petitioners at 31. Here, it is the Petitioners that ignore both *Mills* and *Boyde*. As discussed above, the *Mills* jury instructions also did not contain an express jury unanimity requirement. This Court vacated the death sentence because it could not tolerate the reasonable likelihood that the jury so understood the instruction. *Mills*, 486 U.S. at 384. Nor does *Boyde* require explicit language for a violation to result. If explicit language *were* required, however, it is present in the verdict sheet. In placing a check by a mitigating circumstance, the jury was affirmatively stating that "WE THE JURY HAVE UNANIMOUSLY FOUND" that mitigating circumstance. J.A. 66-68.

For its part, CJLF appears to suggest both that the jury instructions and verdict sheet could have been interpreted as requiring only that the jury "continue deliberating until it is unanimous *one way or the other*," Brief for *Amicus Curaie* CJLF, at 26 (emphasis original), and that under *Boyde*, a state court could assume that a jury would ignore contrary instructions and just get the ultimate verdict right. *Id.* at 27-28.

The former argument grasps at straws. The Supreme Court of Pennsylvania and Petitioners urge that the instructions and verdict sheet contained *no* requirement of unanimity; now CJLF concedes that the instructions and verdict sheet suggested unanimity, but argues the jury could have thought this meant unanimity both for and

against the finding of a mitigating circumstance. CJLF does not suggest where in the instructions and verdict sheet the jury could draw the necessary conclusion that it must be unanimous to *find* aggravating circumstances, but to *find or reject* mitigating circumstances. Its reading would also have resulted in rewriting Pennsylvania capital sentencing law, to provide for a mistrial if the jury could not reach unanimity as to any of the mitigating circumstances.

CJLF's latter argument – besides being contrary to *Mills* itself – would "place[ ] law-abiding jurors in an impossible situation." *Penry v. Johnson*, 532 U.S. 782, 799 (2002). It assumes that a reasonable jury in fact would have understood the instructions and verdict sheet as requiring unanimity to find and then weigh mitigating circumstances, but that such a jury would ignore its instructions, decide what ultimate outcome it thought was appropriate, and fill out the verdict sheet in a manner consistent with that outcome. The breathtaking assertion that courts should assume jurors disregard their instructions if they think the instructions would lead to an unjust result is inconsistent with every Eighth Amendment decision of this Court since *Gregg v. Georgia*, 428 U.S. 153 (1976), and its companion decisions established that guided sentencing discretion is a solution to the Eighth Amendment violative risk of arbitrariness in capital sentencing identified in *Furman v. Georgia*, 408 U.S. 238 (1972). If CJLF is correct, and sentencing juries feel free to disregard their instructions in favor of arriving at what they think is a just result, then we are right back to *Furman*. As Justice Kennedy has noted, however, *Mills* stands as a necessary protection against such arbitrariness. *McKoy*, 494 U.S. at 456 (Kennedy, J., concurring).

The state court's decision was both "contrary to" *Mills*, and an "unreasonable application" of that decision. Accordingly, § 2254(d) creates no barrier to the grant of habeas relief. The decision below should be affirmed.

CONCLUSION

The decision of the Court of Appeals for the Third Circuit should be affirmed.

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In The
Supreme Court of the United States

JEFFREY A. BEARD, Commissioner, Pennsylvania Department of Corrections; JAMES PRICE, Superintendent of State Correctional Institution at Greene; RAYMOND J. COLLERAN, Superintendent of State Correctional Institution at Waymart; COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

GEORGE E. BANKS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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ARGUMENT

I. *TEAGUE* BARS CONSIDERATION OF BANKS' *MILLS V. MARYLAND* CLAIM.

A. Contrary to Banks' contentions, *Penry*, *McKoy*, and *Walton* do not demonstrate that the *Mills* rule of non-unanimity was dictated by prior precedent.

This Court has already addressed the application of the doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), to mitigation process rules like that established in *Mills v. Maryland*, 486 U.S. 367 (1988). In *Saffle v. Parks*, 494 U.S. 484, 490 (1990), the Court distinguished for *Teague* purposes between rules "relating, not to *what* mitigating evidence the jury must be permitted to consider in making its sentencing determination, but to *how* it must consider the mitigating evidence." The Court recognized that arguments for the creation of both types of mitigation rules – categorical and procedural – might be made based on the "individualized sentencing" principle of *Lockett v. Ohio*, 438 U.S. 586 (1978), and its progeny. That principle, however, which arose from cases involving categorical restrictions on the factors available for mitigation, was sufficiently abstract that it could not be said to *dictate* – to "compel" – the creation of a different type of mitigation rule governing "how the State may guide the jury in considering and weighing those factors." *Id.* at 490-91.[1]

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[1] *See also Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988) ("we have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required"); *Barclay v. Florida*, 463 U.S. 939, 961 (1983) (*Lockett* cases do not establish "the weight which must be given to any particular mitigating evidence, or the manner in which it must be considered") (Stevens, J., concurring in judgment).

Banks does not contest that *Mills* is a "how" rule concerning the consideration of mitigation evidence. Instead he argues that the distinction drawn in *Saffle* is without legal significance. He contends that "how" rules can have the same impact as "what" rules – *i.e.*, creating barriers to full consideration of mitigating evidence – and that therefore *Mills* was dictated by *Lockett* and is applicable on collateral review in his case. As authority for this implicit challenge to *Saffle*, he cites this Court's own opinion in *Penry v. Lynaugh*, 492 U.S. 302 (1989). Brief for Respondent at 21-22.

Preliminarily, Banks' position is puzzling because *Saffle*, not *Penry*, is the later case; if there were a conflict between the two, it is *Saffle* that would control. But there is no conflict. Indeed, the author of the Court's opinion in *Penry* joined the Court's opinion in *Saffle* the very next term. *Saffle* discusses *Penry* in explaining that rules regarding category-type restrictions on mitigation are dictated by *Lockett*, while other types of rules, governing the process for considering mitigation factors, are not. 494 U.S. at 490-91.

Banks' grand reliance on *Penry* to vindicate his *Teague* position ignores these facts and instead proceeds on a mischaracterization. He portrays the issue in *Penry* as involving, like *Mills*, a restriction on the manner in which the jury considered mitigating evidence, rather than a limit on the kinds of information to which the jury could give effect. Since Penry's claim was not *Teague*-barred, he says, neither is his. But the Court saw the question in *Penry* quite differently: as the latest installment in the case-by-case process of determining whether various types of mitigating evidence were properly cognizable under a particular capital sentencing scheme.

The immediate precursor to *Penry* in this effort was *Franklin v. Lynaugh*, 487 U.S. 164 (1988). There the defendant argued that the jury instructions did not allow jurors to consider character evidence concerning his good behavior while in prison. The concurrence, which provided

the necessary votes for the judgment, took the view that the Texas capital sentencing questions did allow the jury to give effect to such evidence. The concurrence noted that other types of character evidence might not fit within the special questions, and could therefore create a classic *Lockett* exclusion. *Id.* at 183-86 (O'Connor, J.).

Penry presented the situation presaged by the concurrence in *Franklin*. Penry sought mitigation based on evidence of mental retardation and abuse during childhood. The Court held that the Texas capital sentencing questions, although adequate for the type of evidence proffered in *Franklin*, were too narrow to give mitigating effect to the kind of evidence offered by Penry. Such a categorical exclusion was precisely within the command of *Lockett*, and therefore did not require the creation of a new rule under *Teague*. 492 U.S. at 314-28.

Mills, on the other hand, falls outside the traditional *Lockett* analysis employed in the *Penry* decision. As Banks would have it, *Lockett* was a sort of universal solvent washing away all walls that would regulate a jury's consideration of any evidence that might be called mitigating. *Mills* was just another wall, so it had to go, as a matter of indisputable mandate. But the Court's *Lockett* jurisprudence was not so indiscriminate. In the years preceding *Mills*, *Lockett* was applied by this Court to identify the kinds of mitigation that a jury must be permitted to use in reaching a reasoned moral response to the defendant and his crime. *See, e.g., California v. Brown*, 479 U.S. 538 (1987) (O'Connor, J., concurring). While other varieties of capital sentencing provisions might be characterized as barriers to mitigation, such a label could not dictate results from case to case.

Indeed even cases *after Mills* illuminate the uncertain contours of *Lockett*'s development in relation to sentencing procedures like jury unanimity. In *McKoy v. North Carolina*, 494 U.S. 433 (1990), decided twenty months after *Mills*, the unanimity question was still sufficiently clouded that four members of the Court were unable to discern the

rule within *Lockett*. *See* Brief for Petitioners at 19. A legal principle under such continuing disagreement is clearly a poor candidate for the kind of indisputable mandate required by *Teague*. Yet Banks, joined by his amicus, the Pennsylvania Association of Criminal Defense Lawyers, has found an even less compelling basis for the necessary mandate, located in Justice Kennedy's *McKoy* concurrence. Brief for Respondent at 23-24; PACDL brief at 6-9. That opinion took the position that a rule requiring non-unanimity at the mitigation stage could not be found within *Lockett*, but could be derived from the general prohibition on arbitrariness tracing back to *Furman v. Georgia*, 408 U.S. 238 (1972). 494 U.S. at 452-56 (Kennedy, J., concurring in judgment). But this is the very first announcement of a general "arbitrariness" principle, *distinct* from *Lockett*, applicable to mitigation procedures – and eight of the nine justices in *McKoy* declined to subscribe to it. Justice Kennedy's views in *McKoy* can hardly be described as "dictated" by prior precedent for *Teague* purposes.

Banks and his amicus make the usual error of claimants seeking "old rule" harbor: they treat precedent as mandate, while the function of *Teague* is to distinguish between the two. As Justice Kennedy himself wrote for the Court in *Saffle* (on the very same day as *McKoy*), "[e]ven were we to agree that our decisions in *Lockett* and *Eddings* [*v. Oklahoma*, 455 U.S 104 (1982)] inform, or even control or govern . . . , it does not follow that they compel." 494 U.S. at 491.

Yet another case from the same Term as *McKoy* demonstrates the unsettled application of *Lockett* principles to the regulation of the sentencing jury at the mitigation stage. In *Walton v. Arizona*, 497 U.S. 639 (1990), the Court held that there was nothing unconstitutional at all in requiring jurors to disregard mitigating factors unless they were convinced of them by a preponderance of the evidence. Banks and the PACDL argue that *Walton* is irrelevant to *Teague* analysis of the *Mills* non-unanimity

rule, because the preponderance standard at issue there obviously had no preclusive effect on jurors' consideration of relevant mitigation evidence. Brief for Respondent at 22-23; PACDL brief at 11-12. But that proposition has not been obvious to members of this Court. In *McKoy*, for example, the majority of the Court pointed out that

> evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence . . . . The meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding . . . . Whether the fact-finder accepts or rejects the evidence has no bearing on the evidence's relevancy. The relevance exists even if the fact-finder fails to be persuaded by that evidence. It is not necessary that the item of evidence alone convinces the trier of fact or be sufficient to convince the trier of fact of the truth of the proposition for which it is offered.

494 U.S. at 440 (internal quotations and citations omitted).

It is not difficult to argue from such principles that a preponderance standard does indeed create a barrier to the consideration of relevant mitigating evidence in violation of *Lockett*, and four justices of the Court made exactly that argument in *Walton*.

> [U]nder Arizona law, [the sentencer] is entitled to give *no* weight to mitigating evidence on the ground that the evidence is *not mitigating enough*. Under the guise of a burden of proof, the statute provides that some mitigating evidence is not to be considered at all . . . . Decisions as to punishment, like decisions as to guilt or innocence, will often be based on the *cumulative*

> effect of several pieces of evidence, no one of which by itself is fully persuasive.

497 U.S. at 683-84 (Blackmun, J., dissenting) (emphasis in original). The dissenters went on to point out that, even if the sentencer were 49% convinced of each and every mitigating circumstance, the mitigation could not be given effect. *Id.* at 684. Indeed, in a jury sentencing system, all twelve jurors could agree unanimously that they were in equipoise on the existence of numerous mitigating factors, and yet be precluded from weighing any of them against aggravating circumstances. Viewed from this perspective, a preponderance standard would constitute *more* of a barrier to the consideration of mitigating evidence than the "single holdout" scenario that was so important to the decisions in *Mills* and *McKoy*.

Yet Mills won, and Walton lost. The point, of course, is not that one decision was correct and the other incorrect. The point is that litigants, and justices, made the same arguments, from the same precedents, over the same time period, to attack both unanimity and preponderance rules in the mitigation process – but with opposite outcomes. Surveying this legal landscape, the very least that can be said is that it was hardly smooth, and certainly not so straightforward as to reveal an indisputable mandate for the result in *Mills*.

Faced with the difficulty of surmounting this *Teague* barrier, Banks argues in effect that the standard should simply be lowered for him. He contends that "*Teague* does not treat all categories of rules in the same fashion," and that *Mills* is a rule for which he does not have to show an indisputable mandate. Brief for Respondent at 20. But in fact the *Teague* standard does not change depending on the content of the underlying rule; it just applies with different results. Whatever the nature of the rule subjected to *Teague* analysis, it must be compelled by, dictated by, existing law, or it cannot be employed on collateral review.

When Banks portrays *Mills* as nothing more than *Lockett* with a little twist of facts, he is playing down its place in the law. In reality *Mills*, while evolved from *Lockett*, exists as a distinct family of claims. On occasion rules of law, especially broad, abstract rules like the principle of "individualized sentencing," give birth to more specific requirements, creating new sub-classes of contentions that no longer depend directly on application of the original principle for their resolution. Thus in *Mills* cases, in contrast to mainstream *Lockett* decisions such as *Franklin* and *Penry*, no inquiry is necessary concerning the specific evidence offered and the manner in which it might have mitigating effect; the only question is whether, *per se*, the jury was required to reach unanimity before giving weight to such evidence.[2] That discrete basis for Eighth Amendment relief, however grounded in *Lockett* it may be, constitutes a new rule subject to the *Teague* bar on collateral review.

Expanding upon Banks' efforts to temper the *Teague* standard, however, the amicus brief of the American Civil Liberties Union[3] insists that developments in the law are not new, and thus may be invoked on collateral review, as long as they "fairly rest" on existing precedent. Any statements that appear to require more are, according to the ACLU, mere *dicta*. ACLU brief at 4, 9, 11, 27-29. As authority for its *Teague*-lite, "fairly rest" test, the ACLU cites two cases, *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994), and *Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000), that say no such thing. This Court has made very clear that legal developments are new rules unless *dictated* by

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[2] Indeed the petitioner in *Penry* did not deem *Mills* to be of sufficient bearing on his case to cite it in his brief, even though at the time it was the Court's most recent Eighth Amendment ruling. Nor did this Court mention *Mills* in its decision in *Penry*.

[3] Joined by the National Association of Criminal Defense Lawyers.

existing precedent, and has refused to apply such developments, even where controlled by a prior decision, to cases on collateral review. *See, e.g., Butler v. McKellar*, 494 U.S. 407 (1990) (rule of *Arizona v. Roberson*, 486 U.S. 675 (1988), although directly controlled by earlier precedent of *Edwards v. Arizona*, 451 U.S. 477 (1981), was susceptible to debate among reasonable minds, and therefore was not applicable to cases on collateral review). Because the rule of *Mills v. Maryland* was not mandated by existing precedent, and because Banks argues neither of the two exceptions to the *Teague* bar, *Mills* could not be applied on collateral review.[4]

[4] The remaining assertions in the ACLU amicus brief amount to an extended straw-man argument. The ACLU maintains that, in the view of the Commonwealth and amicus Criminal Justice Legal Foundation, "*Teague* bars a claim from consideration in federal collateral proceedings unless a state court acted or might have acted unreasonably by rejecting the claim on the merits in the particular circumstances of a prisoner's case." ACLU brief at 2. Similarly, contends the ACLU, the position of the Commonwealth and CJLF is that "*Teague* has evolved into a blanket injunction that federal courts must defer to reasonable state court decisions." ACLU brief at 17.

Building on this foundation, the ACLU goes on at some length to explain that such an interpretation of *Teague* was rejected by a majority of the Court in *Wright v. West*, 505 U.S. 277 (1992), and would expand *Teague* into a rule of deference that would swallow up § 2254(d) of the AEDPA.

The ACLU neglects, however, to identify any page or language in the briefs of the Commonwealth or CJLF where this over-expansive view of *Teague* is articulated. In reality no such argument has been made. To the contrary, the Commonwealth argued just last Term in this case that the *Teague* inquiry is distinct from § 2254 and requires independent analysis. This Court agreed. *Horn v. Banks*, 536 U.S. 266 (2002), Pet. App. 61-68. Consistent with that differentiation, the *Teague* analysis in this case focuses not at all on the particular circumstances of the prisoner, but instead on the nature of the *Mills* rule within the context of existing law. The facts relevant to the state court's resolution of Banks' *Mills* claim, on the other hand, and the reasonableness of that

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B. Bank's conviction and sentence became final for *Teague* purposes at the conclusion of direct appeal in 1987, not at the conclusion of collateral review in 1995.

As an alternative argument, Banks contends that this is not a retroactivity case at all. Rather, he argues that his conviction became final not in 1987 but in 1995 – conveniently long after this Court's decision in *Mills* – when the Pennsylvania Supreme Court, on collateral review of the conviction, excused Banks' default of the *Mills* claim and rejected the claim on its merits. Brief for Respondent at 24-31. Banks' position is that, because of its practice of excusing some defaults in capital cases, the state court effectively employed an unspoken definition of "final judgment" that secretly transmutes collateral review into just another phase of direct appeal. If his collateral appeal is simply relabeled as a direct appeal, argues Banks, then *Teague* analysis becomes unnecessary.

Perhaps the most immediate problem with this argument is that it is utterly inconsistent with this Court's last opinion in this case. In *Horn v. Banks*, 536 U.S. 266 (2002), Pet. App. 61-68, the Court held that the Third Circuit *must* review the retroactivity question, even though the state court did not. In other words, the state court's decision to reject the claim on the merits (rather than on waiver or retroactivity grounds) does not change the obligation of federal courts sitting in habeas to address retroactivity when properly raised.

Banks asserts that last year's opinion should be disregarded, because "this Court did not have the opportunity to fully examine" his argument then. Brief for Respondent at 25 n.25. In reality, however, Banks

resolution, are the subject of the second question presented, concerning deference under § 2254.

presented essentially the same contention at that time: that *Teague* was not applicable to Pennsylvania collateral review, because the state court in capital cases often excused defaults under its "relaxed waiver" practice. Brief in Opposition to Petition for Writ of Certiorari, No. 01-1385, October Term 2001, at 1-2 & n.1. The fact that his argument takes up more pages now does not entitle Banks to reopen his previously rejected position.

Even apart from this Court's ruling in *Horn v. Banks*, there is another glaring problem with Banks' attempt to redefine the point of final judgment in his case: the Pennsylvania Supreme Court has already made a contrary determination. In *Commonwealth v. Banks*, 726 A.2d 374, 375 (Pa. 1999), on appeal from Banks' second collateral review petition, the state court observed that Banks' direct appeal did indeed conclude in 1987, and the judgment became final at that point.

Banks contends that this problem too can be disregarded. He notes that the state court's previous statements about final judgment in this case arose in the course of applying the filing deadline now contained in Pennsylvania's Post-Conviction Review Act. The filing deadline provision defines final judgment as the conclusion of direct review. 42 Pa. C.S.A. § 9545(b)(3). Banks suggests that this is not Pennsylvania's true definition of final judgment for *Teague* purposes, and that the state court's 1999 ruling in his case can therefore be overlooked. Brief for Respondent at 29. In reality, however, the definition of final judgment already applied by the highest state court in Banks' case is simply the standard meaning of the term, completely consistent with Pennsylvania law (from which it was directly drawn) and with this Court's understanding of the concept.[5] There is no basis for ignoring the

[5] *E.g., Commonwealth v. Riggins*, 542 A.2d 1004, 1010 (Pa. Super. 1988) ("conviction became final when it was affirmed on direct appeal";

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Pennsylvania Supreme Court's ruling that Banks' conviction and sentence became final in 1987 at the conclusion of direct review.

But even if that ruling had never been made, Banks' depiction of Pennsylvania law concerning final judgment would still be insupportable. Banks insists that Pennsylvania had a special, albeit clandestine, rule for final judgment in capital cases: that rule, in effect, was that there was no such thing as final judgment in capital cases. He deduces this unlikely result from the notion of "relaxed waiver" – the state supreme court's previous practice, as a matter of discretion, of excusing some defaults in capital appeals. Originally, the practice was designed as a safety net with which the court could catch egregious errors, at a time when channels of collateral review were less well-established than they later became. Over time, the court realized that the practice allowed litigants intentionally to hold back claims, thereby dragging out the growing length of the capital review process. After warnings proved fruitless, the court eventually abolished the practice. In doing so, the court expressed its concern that relaxed waiver had jeopardized the goal of finality.[6]

thus appellant not entitled to benefit of new law on collateral review); *Commonwealth v. Galloway*, 640 A.2d 454 (Pa. Super. 1994) ("appellant's conviction became final when our Supreme Court affirmed his judgment of sentence"; citing *Teague*); *see Fiore v. White*, 528 U.S. 23, 24 (1999) (after initial appeal, "[t]he Pennsylvania Supreme Court denied further review of Fiore's case, and his conviction became final"); *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) ("[a] state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied").

[6] *See generally Commonwealth v. Albrecht*, 720 A.2d 693, 700-701 (Pa. 1998); *Commonwealth v. Bracey*, 795 A.2d 935, 951-56 (Pa. 2001) (Castille, J., concurring) (describing development, purpose, and limits

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Banks seizes on the state court's use of the word "finality" in some of these decisions. Relaxed waiver prevented "finality," notes Banks; therefore as long as relaxed waiver existed, Pennsylvania capital judgments could not become final. Brief for Respondent at 26-27. Banks' syllogism, however, is specious. The Pennsylvania Supreme Court's references to finality as a jurisprudential objective cannot be interpreted as a *sub silentio* redefinition of the technical requirement of "final judgment."[7]

But there is no need to speculate on the point, or to knit Banks' fragments of "finality" quotations back into their proper context, because, in cases Banks does not mention, the Pennsylvania Supreme Court has been perfectly clear about its understanding of final judgment in *precisely* the context now before this Court. Thus, in *Commonwealth v. Peterkin*, 649 A.2d 121, 126 n.4 (Pa. 1994), the court held that the rule of *Mills v. Maryland* could not be applied to the appellant's claim, because his direct appeal became final before *Mills* and he was now on collateral review. In *Commonwealth v. Whitney*, 708 A.2d 471, 479 (Pa. 1998), the court made the same ruling. And in *Commonwealth v. Jermyn*, 709 A.2d 849, 869-70 (Pa. 1998), the court said it again.[8] All of theses cases were

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to "relaxed waiver"); *Commonwealth v. Freeman*, 827 A.2d 385, 398-401 & n.9) (Pa. 2003) (same).

[7] At one point in his brief, Banks quotes the words "finality of the judgment" in juxtaposition with a citation to *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998), implying that *Albrecht* indeed addresses the final judgment question rather than "finality" as a general aspiration. Brief for Respondent at 26. In fact, however, the words "finality of the judgment" appear nowhere in the *Albrecht* opinion, either together or in any proximity to each other.

[8] *See also Commonwealth v. Szuchon*, 693 A.2d 959, 962 (Pa. 1997) (rule of *Simmons v. South Carolina*, 512 U.S. 154 (1994), could not be applied because appellant's conviction and sentence became final before *Simmons*, at conclusion of direct appeal); *Commonwealth v.*

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capital; all were subject to relaxed waiver; yet all were deemed final at the conclusion of direct appeal. That is Pennsylvania law on final judgment in the capital collateral review context.

Banks' conviction and sentence became final in 1987. Ever since, he has been litigating on collateral review. *Teague* applies.

II. THE STATE COURT REASONABLY CONCLUDED THAT THE *MILLS* RULE IS NOT VIOLATED WHERE THE JURY WAS *NOT* INSTRUCTED TO BE UNANIMOUS IN ORDER TO FIND MITIGATING CIRCUMSTANCES, AND WAS INSTEAD INSTRUCTED TO BE UNANIMOUS IN ORDER TO *REJECT* MITIGATION.

In *Mills v. Maryland*, the verdict form explicitly instructed the jurors that they could mark "yes" for a mitigating circumstance only if they found it "unanimously," and that only such yesses could be considered in the weighing process. 486 U.S. at 387. In *McKoy v. North Carolina*, the verdict form explicitly instructed the jury that it must find mitigating circumstances "unanimously," and that it could weigh only those mitigating circumstances so found. 494 U.S. at 436-37. In this case the jury was never instructed that it had to be unanimous in order to consider mitigating circumstances, but was instead explicitly instructed that it must weigh "any" mitigation unless it was unanimous in finding *none*.

Henry, 706 A.2d 313, 322-23 (Pa. 1997) (same); *Commonwealth v. Abu-Jamal*, 720 A.2d 79, 120 (Pa. 1998) (same).

Cf. Massaro v. United States, 538 U.S. 500 (2003) (excusing normal default rules in order to allow raising of ineffective assistance claims on collateral review rather than direct appeal).

Almost every court addressing this latter type of case, which lacks an express unanimity requirement for finding mitigation (essentially an "un-*Mills*" instruction) has upheld the constitutionality of the verdict. These courts have included, until its recent reverse, the Third Circuit itself. Banks labors to close the *Mills* gap between the kind of overt instruction this Court has condemned and the kind of neutral instruction that has been consistently approved; but he does not succeed.

Banks' initial effort to cross this divide is not an argument but the absence of one: he quietly ignores the decisions, from at least five federal circuits, sustaining unanimity-neutral mitigation instructions. *See* Brief for Petitioners at 33, 39-41. He makes no effort to distinguish any of these cases from his own. Most striking is his silence concerning the Third Circuit; he says nothing at all about the "sound-bite" theory invoked by the court of appeals to explain its change of view on Pennsylvania jury instructions. *See* Brief for Petitioners at 32-35.[9] But this is an AEDPA case, subject to the deference requirement of § 2254, and neither parties nor courts can disregard the terrain. The views of other jurisdictions on similar issues are highly relevant in determining whether a state court reasonably applied the law to a federal claim. If even Banks has no argument that these cases are either distinguishable or wrong, the Pennsylvania court could not have acted unreasonably in reaching comparable conclusions.

Rather than address the deference question in this context, Banks tries to hearken directly back to *Mills* by

[9] Indeed, Banks' only reference to the conflicting Third Circuit opinions, in a footnote on the forty-fifth page of his brief, serves to emphasize the factual similarities between them: "The *Frey [v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997)] verdict sheet was materially indistinguishable from the one reviewed in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991)." Brief for Respondent at 45 n.40.

comparing the Pennsylvania and Maryland capital sentencing statutes. He claims that in both states courts have had to devise "saving constructions" to eliminate *Mills* error from their law. Since juries could not have known of these after-the-fact constructions, they must have assumed that mitigating evidence could not be weighed unless found unanimously. Brief for Respondent at 33-34, 45. But in fact the Pennsylvania Supreme Court has made clear the view that its statute does not need saving. That is because Pennsylvania law states that the jury must be unanimous to find "no" mitigating circumstances. If it is not unanimous on this point, it must weigh "any" mitigating circumstances against aggravating factors. *Commonwealth v. Hackett*, 627 A.2d 719, 725 (Pa. 1993). The statute commands on its face that the jury be so instructed. 42 Pa. C.S.A. § 9711(c)(1)(iv).

Maryland law had no such provision. In its place, the *Mills* verdict form permitted the jury to consider only the mitigating circumstances that "we unanimously find." 486 U.S. at 387. An instruction explicitly requiring unanimity to find the *presence* of mitigation is materially different than an instruction explicitly requiring unanimity to find the *absence* of mitigation, and it was not unreasonable for the state courts to say so. Banks' effort to equate Pennsylvania and Maryland sentencing laws works only to highlight the essential divergence between this case and *Mills*.[10]

[10] While there was a split on the Court in *Mills* concerning the nature of the jury instructions given in that case, there was no dispute that the instructions explicitly required unanimity to find the presence of mitigation. The point of contention between the majority and dissent turned on whether the jury would *also* have understood the instructions to require unanimity to find the absence of mitigation. *Compare* 486 U.S. at 378-79 *with* 486 U.S. at 391-94 (Scalia, J., dissenting). In the present case, in contrast, there was *no* instruction requiring unanimity to find mitigation, and there *was* an instruction requiring unanimity to

(Continued on following page)

Lacking the express requirement of unanimity that is found in *Mills*, Banks attempts to create one by sheer imputation. He patches together various pieces of language from the charge and verdict slip, but always according to the same pattern: 1) the jury was told to find aggravating circumstances unanimously; 2) the jury was told to find mitigating circumstances; 3) therefore the jury was told (or so it would only "naturally" conclude) to find mitigating circumstances unanimously. Armed with this axiom, Banks is able to locate "error" all over the record, because of course the trial court and verdict sheet did use the words "mitigating" and "finding," now redefined to read "unanimous mitigating finding." Brief for Respondent at 34-40.

But Banks does not answer the real questions raised by his reasoning: Why would the jurors presume the *presence* of a mitigation unanimity requirement from the *absence* of a mitigation unanimity requirement? Why would they think the trial judge went to the trouble of using *different* language for aggravating and mitigating findings if he really meant them to be treated the *same*? The law works on exactly the opposite presumption: that the expression of one thing is the exclusion of another. This rule of construction "is based on logic and common sense, as it expresses the learning of common experience that when people say one thing they do not mean something else." *People v. Sherman*, 786 N.E.2d 139, 155 (Ill. 2003) (internal quotation and citation omitted). That is why the courts of appeals have generally rejected *Mills* claims where the instructions state a unanimity requirement for aggravation but are silent as to mitigation.

Banks perhaps hopes to avoid these difficulties by starting his argument from the proposition that even the

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reject mitigation. This is the exact converse of the circumstances in Maryland as perceived by the *Mills* majority.

jury in *Mills* was never expressly instructed to be unanimous in finding a mitigating circumstance. Brief for Respondent at 34. This premise permits him then to discuss all the ways in which his own jury also was not expressly instructed to be unanimous on mitigation,[11] and yet to conclude that he is nonetheless entitled to relief. The problem is that the premise is, as noted above, untrue.

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[11] *E.g.*, the verdict sheet, J.A. 66-68, which exactly followed the structure of the Pennsylvania sentencing statute. The form, like the statute, provided two alternative bases for a death verdict: either 1) that the jury unanimously find at least one aggravating circumstance and no mitigating circumstances, or 2) that the jury unanimously find at least one aggravating circumstance that outweighs any mitigating circumstances.

Similarly, Banks complains that the judge used the word "you" in addressing the jury during the sentencing charge. Banks contends that "you" is a "collective pronoun," meaning that the jury had to do everything together. Brief for Respondent at 37. In the English language, however, "you" is both a singular and plural pronoun, and it is unclear why the jurors would have understood the word to mandate unanimity. *See Commonwealth v. Jermyn*, 709 A.2d 849, 869 (Pa. 1998) (rejecting claim that trial court's use of "you" and "your" was equivalent to mitigation unanimity requirement under *Mills*).

In the same fashion, Banks highlights the judge's use of the phrase "scale of justice" in discussing the weighing process. Since there was only one (metaphorical) scale, says Banks, the jury would have to reach unanimity to employ it. Brief for Respondent at 37-38. Actually the judge mentioned both "scale" and "scales" during the charge, J.A. 26-27; but in any case it is difficult to imagine that the jury understood the reference as a requirement for unanimity in finding mitigating circumstances.

One aspect of the sentencing proceedings not discussed by Banks is the individual jury polling conducted at defense request after the verdict was reached. The judge began with juror no. 1, asked her if her verdict was based on the same criteria announced by the foreman or anything different, and then proceeded in similar fashion with each of the twelve jurors as to each of the twelve death verdicts for the twelve killings that were found to be first degree murder. J.A. 32-65.

The *Mills* jury *was* explicitly limited to unanimous mitigation findings. 486 U.S. at 387 ("we unanimously find . . . the following mitigating circumstances"). Banks' jury was not, and the state court's distinction on this ground was – at the very least – not unreasonable.

This brings Banks back to the central impediment for his and most other *Mills* claims in Pennsylvania: that the jury was instructed, as required by statute, to return a verdict of death only if 1) it unanimously found at least one aggravating circumstance and no mitigating circumstances, or 2) it unanimously found at least one aggravating circumstance that outweighed any mitigating circumstances. Banks points out that, by imagining the appearance of just a few extra words in the second option, its meaning is radically transformed. Thus, if the "unanimously" phrase were simply repeated – if the jury were instructed to vote for death if it unanimously found at least one aggravating circumstance that outweighed any mitigating circumstances *that it unanimously found* – a *Mills* problem would arise. *See* Brief for Respondent at 47-48. Certainly: the addition of another reference to unanimity, placed grammatically so as to modify "mitigating circumstances" directly, would put the ball in the hole for any *Mills* claimant. But neither the rule of law nor the rules of grammar permit such a rewrite of the instruction.

Banks' real complaint in this regard appears to be that a single sentence should not be sufficient to determine the outcome of his *Mills* claim. *See* Brief for Respondent at 43-48. There is only one concept at issue here, however, and it is an idea that can be stated in a single sentence. Various forms of that sentence may appear throughout the charge or verdict sheet, but if the concept is stated correctly, the instructions are proper, and if not they are not. Thus in *Mills* and *McKoy* a single sentence was sufficient to taint the instructions. And even in Banks' view, a single sentence would apparently be sufficient to save the instructions, if that sentence stated explicitly and without contradiction that jurors need not be unanimous

in finding mitigating circumstances.[12] Detailed, separate analysis of the charge and slip might be dispositive if they are inconsistent internally or with each other. But not even Banks argues that such is the case here; his position is that the same "error" occurred throughout the sentencing proceeding: the "error" of talking about unanimity for finding aggravating factors without explicitly talking about non-unanimity for finding mitigating circumstances.

Thus Banks' position is in effect that the Eighth Amendment requires not an "un-*Mills*" instruction but an "anti-*Mills*" instruction in every death penalty case. But this, again, is a § 2254 deference case. The circuit courts have held repeatedly that silence about unanimity for finding mitigating circumstances does not violate the Eighth Amendment, even when that silence occurs in proximity to affirmative requirements of unanimity for finding aggravating circumstances. This case is even stronger than those, because the jury instructions not only avoided any express requirement for finding mitigating circumstances; they also included an explicit command for unanimity in order to *reject* mitigation. The state court did not act unreasonably in ruling that such instructions were proper under the Constitution.

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[12] Banks cites with approval Pennsylvania's new, post-*Mills* capital verdict form, which directs the jury to indicate the "aggravating circumstance(s) unanimously found" and the "mitigating circumstance(s) found by one or more of us." Pa. R. Crim. P. 807. He argues, however, that the form is an acknowledgement that something was wrong with previous practice. Brief for Respondent at 41.

The Pennsylvania Supreme Court has squarely rejected that characterization. Previously, there had been no uniform verdict sheet in capital cases. The purpose of the new form was to ensure a consistent state-wide procedure. *Commonwealth v. Tilley*, 595 A.2d 575, 586 (Pa. 1991). Given the extensive resources devoted to *Mills* litigation over the last two decades, the court understandably chose language that, it hoped, would put such claims to rest in the future.

CONCLUSION

For the reasons set forth above and those in the Brief for Petitioners, petitioners respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Third Circuit, and deny the petition for writ of habeas corpus.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections, *et al.*,
Petitioners,

vs.

GEORGE E. BANKS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Did *Mills* v. *Maryland* create a "new rule" within the meaning of *Teague* v. *Lane*, such that it does not apply retroactively to overturn judgments which became final before it was announced?

2. Was the Pennsylvania Supreme Court's decision in this case, that jury instructions which track the wording of the Pennsylvania statute comply with *Mills*, "contrary to or . . . an unreasonable application of clearly established Federal law" within the meaning of 28 U. S. C. § 2254(d)(1)?

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IN THE

Supreme Court of the United States

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections, *et al.*,
Petitioners,

vs.

GEORGE E. BANKS,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The rules of *Teague* v. *Lane* and 28 U. S. C. § 2254(d) are important and independent limitations on collateral review. The Court of Appeals' erroneously narrow interpretation of

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

these rules will needlessly delay enforcement of the death penalty, reducing its deterrent effect. These delays are contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

Over twenty years ago, George Banks "shot fourteen people . . . killing thirteen and wounding one." *Commonwealth* v. *Banks*, 521 A. 2d 1, 3 (Pa. 1987), cert. denied, *Banks* v. *Pennsylvania*, 484 U. S. 873 (1987). The dead included seven children. See *id.*, at 5. He was sentenced to death in 1983. *Id.*, at 3. Despite the absence of any doubt regarding his identity as the perpetrator, see *id.*, at 8, the execution of the judgment has been delayed for two decades of repetitive review, including a direct appeal, two state collateral reviews, two federal habeas petitions, and associated appeals and petitions for certiorari. See *Banks* v. *Horn*, 63 F. Supp. 2d 525, 530-531 (MD Pa. 1999).

In the current round, the United States Court of Appeals for the Third Circuit denied most of his claims, but it vacated the death sentence based on its disagreement with the Pennsylvania Supreme Court regarding the application of *Mills* v. *Maryland*, 486 U. S. 367 (1988), a precedent established after Banks' sentence became final on direct review. See *Banks* v. *Horn*, 271 F. 3d 527, 540-541 (CA3 2001).

This Court granted certiorari and summarily reversed in *Horn* v. *Banks*, 536 U. S. 266 (2002) (*per curiam*). The *per curiam* opinion confirmed that the nonretroactivity rule of *Teague* v. *Lane*, 489 U. S. 288 (1989) remains an independent limitation on federal habeas corpus and remanded for determination of whether *Mills* was a new rule. 536 U. S., at 272.

On remand, the Third Circuit panel divided. The two-judge majority held that *Mills* was not a new rule within the meaning of the *Teague* line of cases. *Banks* v. *Horn*, 316 F. 3d 228, 229-230 (CA3 2003). The third judge believed *Mills* was a new rule, but also believed that when a state court waives its procedural default rule and considers on collateral review a claim that could have been raised on direct appeal, the case is not "final" within the meaning of *Teague* until the completion of the collateral review. *Id.*, at 255 (Sloviter, J., concurring).[2] This Court granted certiorari on September 30, 2003.

SUMMARY OF ARGUMENT

Mills v. *Maryland* clearly qualifies as a "new rule" under the nonretroactivity jurisprudence of *Teague* v. *Lane* and its progeny. The fact that more than one court has come to the opposite conclusion indicates that further clarification of *Teague* is in order.

A more objective, and less easily evaded, definition can be distilled from Justice O'Connor's opinion in *Wright* v. *West*, with a few caveats. Generally, the rule of a case is new if it can be distinguished factually from the precedents that support it, and the distinction is arguably material, *i.e.*, a difference sufficient to support an argument that the earlier cases should not govern. In addition, a rule is new if other precedents could, at the time, reasonably be interpreted as contrary to the rule.

Mills extended federal regulation of state capital sentencing procedure further and more intrusively into an area previously thought to be the province of the states. It is distinguishable from *Lockett* v. *Ohio* and *Eddings* v. *Oklahoma*, which only governed the substantive factors for decision and not the procedure by which the sentencer reached its decision. This case is therefore like the many prior cases where this Court has

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2. Judge Sloviter made no attempt to reconcile her unique definition of finality with the fact that this Court applied the usual definition in identical circumstances in *Sawyer* v. *Smith*, 497 U. S. 227 (1990). See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Horn* v. *Banks*, No. 01-1385, pp. 4-5.

held similar expansions (or proposed expansions) to be new rules, including *Saffle* v. *Parks*, *Sawyer* v. *Smith*, and *O'Dell* v. *Netherland*.

The second exception to the rule of *Teague* v. *Lane* has been the source of considerable confusion and much unnecessary litigation. In 1971, its purpose was to explain Justice Harlan's concurrence in the retroactive application of *Gideon* v. *Wainwright*, which was then only eight years old. Today, it is a relic. No rules of the "primacy and centrality" of *Gideon* remain to be made, and none have been made for many years.

The unnecessary, unproductive litigation of this obsolete exception can be greatly reduced, in capital cases, by declaring it *per se* inapplicable to new rules governing the discretionary sentencing decision. *Sawyer* v. *Whitley* held that discretionary sentencing issues *never* amount to a "fundamental miscarriage of justice" for the purpose of the exception to the procedural default rule, and the same considerations justify a *per se* rule here.

The present case is distinguishable from *Mills*. *Teague* precludes the new rule that the Third Circuit created to apply to Pennsylvania, and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") precludes collateral attack on the Pennsylvania Supreme Court's reasonable (and correct) application of *Mills*.

ARGUMENT

I. *Mills* was a new rule.

A. New Rules and Factual Distinctions.

The Court of Appeals' holding in the present case, that *Mills* v. *Maryland*, 486 U. S. 367 (1989) is not a new rule for the purpose of *Teague* v. *Lane*, 489 U. S. 288 (1989), is clearly erroneous for the reasons stated in our brief at the petition stage. Indeed, as we noted there, the opinion "comes close to

a catalog of all the ways this Court has held that federal court should *not* conduct a *Teague* inquiry." Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in Support of the Petition for Writ of Certiorari in *Beard* v. *Banks*, No. 02-1603, p. 5. This case could readily be decided on the points stated there. However, this case presents an opportunity to clarify the *Teague* body of jurisprudence, make it more coherent, and reduce unproductive litigation with its attendant expense and delay.

Since it was announced 14 years ago, the rule of *Teague* has been subject to two main objections. The first was that this Court had improperly cut off habeas relief in cases where Congress had intended that such relief be granted. See *Teague*, 489 U. S., at 327-328 (Brennan, J., dissenting). Whatever the merits of this position may have been in 1989, AEDPA eliminated any basis for it. There can be no doubt that Congress enacted this law with awareness of *Teague* and with the intent that it continue. See 28 U. S. C. § 2244(b)(2)(A); *Tyler* v. *Cain*, 533 U. S. 656, 665 (2001).

The second principal criticism is that the *Teague* rule is so confusing and generates so much litigation that its cost exceeds its value. Specifically, the claim has been made " 'that *Teague* has spawned far more confusion than it has eliminated,' . . . [and] [t]he only certain result is additional delay." *In re Gallego*, 18 Cal. 4th 825, 848, 959 P. 2d 290, 306 (1998) (Brown, J., concurring and dissenting) (quoting Friedman, Failed Enterprise: The Supreme Court's Habeas Reform, 83 Cal. L. Rev. 485, 519 (1995)).

There has indeed been much confusion and unnecessary litigation over *Teague* issues. The source, however, is not the *Teague* rule itself but rather the persistent attempts to evade it. The decision of the Court of Appeals in the present case is a prime example. The status of *Mills* as a new rule is simple and obvious, and the years of additional litigation in this case appear to be the result of that court's determination to overturn

this and numerous other Pennsylvania death sentences, rather than any genuine difficulty in the question.

One of the purposes of the *Teague* rule is to avoid continually forcing "the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards," *Teague*, 489 U. S., at 310, resources which could be better spent in improved trials and initial appeals. See *Mackey* v. *United States*, 401 U. S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part). This purpose is defeated if "new rule" is not defined clearly enough that easy cases like this one can be quickly resolved. In most cases, the states should have to marshal only minimal resources to have a *Teague*-barred claim dismissed on that ground in the District Court, and such claims should generally not qualify for a certificate of appealability. See 28 U. S. C. § 2253.

In search of a definition of "new rule" that is more objective and less subject to evasion, it is useful to return to the basics of what is a precedent and what is a rule. The essence of precedent is that a new case which is like a previously decided case should be decided the same way. "A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case . . . ." 1 J. Kent, Commentaries on American Law *475 (8th ed. 1854). That is the easy part. The hard part is deciding which cases are alike and which are different in important aspects, given the infinite variations in the complete facts of real cases. See D. Chamberlain, The Doctrine of Stare Decisis: Its Reasons and Extent 11-15 (N. Y. St. Bar Assn. 1885); Schauer, Precedent, 39 Stan. L. Rev. 571, 577 (1987). The most useful discussion for this purpose can be found in a classic law review article by Cambridge Professor Arthur L. Goodhart, Determining the Ratio Decidendi of a Case, 40 Yale L. J. 161 (1930). Goodhart examines and rejects the propositions that the *ratio decidendi* can be found in either the abstract statement of the rule in the opinion or in the unexplained facts of the case itself. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Grutter* v. *Bollinger*, No. 02-241, pp. 6-7. Instead, the precedent consists of the material facts of the case and the result based on them. The rule is that any case with the same material facts must yield the same result. Cases which differ in their material facts are not controlled by the precedent. The critical question is which facts are material. "It is by his choice of the material facts that the judge creates law." Goodhart, *supra*, at 169.

This view of what is a "rule" is consistent with Justice O'Connor's explanation of *Teague* in *Wright* v. *West*, 505 U. S. 277, 304 (1992) (opinion concurring in the judgment).

> "To determine what counts as a new rule, *Teague* requires courts to ask whether the rule a habeas petitioner seeks can be meaningfully distinguished from that established by binding precedent at the time his state court conviction became final. . . . If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and any deviation from precedent is not reasonable."

A meaningful distinction is not necessarily one that the court will ultimately hold is decisive, so as to require a different result. If it were, there would be no difference between the *Teague* inquiry and the merits. The "meaningful distinction" question must be considered together with the "inquiry as [to] whether 'reasonable jurists' could disagree as to whether a result is dictated by precedent." *Ibid.* (quoting *Sawyer* v. *Smith*, 497 U. S. 227, 234 (1990)). A meaningful distinction is one that reasonable jurists *could* conclude requires a different result, not necessarily one that the court *will* conclude requires a different result.

The evolution of constitutional rules of criminal procedure is typically a series of decisions beginning with a requirement of the Bill of Rights as originally understood and extending its

rule further from the core, until a point is reached where countervailing policies permit no further extension. For example, the Self-Incrimination Clause begins with the common-law rule that the defendant in a criminal case cannot be called to the stand and required to testify. See *United States* v. *Balsys*, 524 U. S. 666, 674, n. 5 (1998); *Miranda* v. *Arizona*, 384 U. S. 436, 510-515 (1966) (Harlan, J., dissenting). From there, *Bram* v. *United States*, 168 U. S. 532, 557-558 (1897) held that an out-of-court statement coerced by law enforcement could not be introduced in the trial. This extension was necessary to prevent the core purpose of the rule from being defeated, and it only had a minimal impact on the countervailing policy of bringing to the trier of fact all relevant, reliable evidence, because coerced confessions are so notoriously unreliable. *Miranda* was a very long extension, excluding from the prosecution's case in chief any in-custody statement taken without warnings and an express waiver. Although *Miranda* furthered the policies of the earlier cases, it did so at a huge cost to the countervailing policy, excluding confessions which are, in fact, voluntary. See *Oregon* v. *Elstad*, 470 U. S. 298, 307 (1985). *Edwards* v. *Arizona*, 451 U. S. 477, 484-485 (1981) excluded confessions taken when police ask again for a waiver after the suspect has once invoked his rights. *Arizona* v. *Roberson*, 486 U. S. 675, 682-683 (1988) further extended this rule to cases where the second request was made by a different law enforcement agency, investigating a different crime. However, *Michigan* v. *Tucker*, 417 U. S. 433, 451 (1974) declined to extend the rule of exclusion to the "fruit" of the interrogation, and *New York* v. *Quarles*, 467 U. S. 649, 657 (1984) made an exception for questioning necessary to deal with an imminent threat to public safety.

Each of these cases can be viewed as involving a meaningful factual distinction from the earlier cases in the series. The voluntary but unwarned confessions in *Miranda* are certainly distinguishable from the coerced confession in *Bram*, and reasonable jurists could and did disagree that exclusion was required. See *Miranda*, 384 U. S., at 525 (Harlan, J., dissenting). *Miranda* was therefore a new rule. See *Johnson* v. *New Jersey*, 384 U. S. 719, 731 (1966) ("in conformity with previously announced constitutional standards"). *Roberson* is meaningfully distinguishable from *Edwards*, in that a repeated request for a waiver which the suspect has already refused is more threatening to the right against self-incrimination than a new request regarding a different offense, and a rule of exclusion covering multiple offenses keeps out more valid evidence than a rule which only covers one. Reasonable jurists could and did believe that this difference was material and called for a different result. See *Roberson*, 486 U. S., at 693 (Kennedy, J., dissenting). Therefore *Roberson* was a new rule, even though the question in the case could be characterized as whether to make an exception to the existing rule. See *Butler* v. *McKellar*, 494 U. S. 407, 414-415 (1990). The factual distinction in *Quarles* was sufficient to convince a majority of the Court that the cost to society of exclusion outweighed the benefit of further protecting the privilege against self-incrimination, even though the facts of the case fit within the abstract statement of the rule in *Miranda*. See 467 U. S., at 657. The "public safety exception" question was undecided until *Quarles* resolved it, and *Quarles* did so without overruling any precedents. Had the decision gone the other way, it would have been a new rule.

These cases demonstrate that it is not sufficient, for the purpose of a *Teague* analysis, to lift an abstract statement of a principle from a case and find that a subsequent case fits within the terms of that statement. Future cases will present meaningful factual distinctions that were not anticipated in the earlier opinion, and the question of whether the distinction makes a difference remains open until that question is decided in a case which presents it. That is how the law develops gradually, but "[t]he principle announced in *Teague* serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Sawyer* v. *Smith*, 497 U. S. 227, 234 (1990).

We can see this principle in operation throughout this Court's *Teague* jurisprudence. In *Gilmore* v. *Taylor*, 508 U. S. 333, 341 (1993), the fact that the instruction in question involved an affirmative defense rather than the elements of an offense was a meaningful distinction from the *In re Winship*, 397 U. S. 358 (1970) line of cases. "Because our cases do not resolve conclusively the question . . . , resolution of the issue on habeas would require us to promulgate a new rule." *Gilmore, supra*, at 351 (O'Connor, J., concurring in the judgment).

In *O'Dell* v. *Netherland*, 521 U. S. 151, 165 (1997) instruction about the defendant's legal eligibility for parole, see *Simmons* v. *South Carolina*, 512 U. S. 154 (1994) was distinguishable from the jury's consideration of facts regarding a defendant's good behavior in prison in *Skipper* v. *South Carolina*, 476 U. S. 1, (1986), even though both bear on the question of future dangerousness. "It is a step from a ruling that a defendant must be permitted to present evidence of that sort to a requirement that he be afforded an opportunity to describe the extant legal regime." *O'Dell*, *supra*, at 162. The *O'Dell* Court did not say how large a step, and it did not need to. *Simmons* was rationally distinguishable from *Skipper* on that basis, and therefore it created a new rule.

In *Caspari* v. *Bohlen*, 510 U. S. 383, 388 (1994), the Eighth Circuit had rejected a *Teague* objection, saying " 'it is a short step to apply the same double jeopardy protection to a non-capital sentencing hearing as the Supreme Court applied to a capital sentenc[ing] . . . hearing.' " This Court reversed. *Ibid.* Whether short or long, it was still a step, and the fact that Bohlen's case was not capital provided a rational basis for distinguishing *Bullington* v. *Missouri*, 451 U. S. 430 (1981). See *Caspari*, *supra*, at 392.

Three caveats apply to the factual distinction approach to *Teague* analysis. First, for some rules the operative "fact" is itself a mixed question of law and fact. "If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific

applications without saying that those applications themselves create a new rule." *Wright* v. *West*, 505 U. S., at 308 (Kennedy, J., concurring in the judgment). See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Yarborough* v. *Alvarado*, No. 02-1684, Part II-B.

Second, it is important to keep in the foreground the requirement that the factual distinction need only be one that "[a] reasonable jurist [at the time] *could* have drawn . . . ." *O'Dell*, 521 U. S., at 165 (emphasis added). To this end, it is preferable to drop the term "meaningful" used in Justice O'Connor's *Wright* opinion, because that term is so easily susceptible to evasion. An *arguably material* factual distinction is one that "change[s] the force with which the precedent's underlying principle applies," 505 U. S., at 304, because it either makes the policy behind the precedent less weighty or it makes the countervailing considerations more so. The change in force may not be sufficient to change the outcome when the merits are finally decided, but any change in the right direction is sufficient to make the question an open one and its resolution a new rule.

Third, it must be recognized that the Supreme Court precedents in an area are not always "a model of clarity." *Lockyer* v. *Andrade*, 538 U. S. 63, 155 L. Ed. 2d 144, 155, 123 S. Ct. 1166, 1173 (2003). Even when one precedent would appear to dictate a particular result if considered in isolation, another precedent may be reasonably interpreted to point in the other direction. *Sawyer*, 497 U. S., at 236-237, noted contrary indications from prior cases in concluding that *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) was a new rule. *O'Dell*, 521 U. S., at 162-166, relied on indications in *Caldwell* and *California* v. *Ramos*, 463 U. S. 992 (1983), that instruction of juries regarding postsentencing review is a matter for the states, in holding that *Simmons* was a new rule. These contrary indications were sufficient to make *Simmons* a new rule, "[*w*]*hatever* support *Gardner* and *Skipper*, standing alone, might lend to petitioner's claim that *Simmons* was a foregone

conclusion . . . ." *O'Dell*, *supra*, at 162 (emphasis added). Because "*Teague* asks state-court judges to judge reasonably, not presciently," *id.*, at 166, the resolution of contrary indications in this Court's precedents is a new rule.

A focus on arguably material factual distinctions should curb the most egregious failures to apply the *Teague* rule. In *Bohlen*, there can be no doubt that the capital/noncapital distinction is one that reasonable people might find material. In *Saffle* v. *Parks*, 494 U. S. 484, 490 (1990), there is no doubt that an instruction that tells the jury not to consider mitigating evidence at all is different from one that tells them not to be swayed by sympathy, and the argument against the latter is weaker than the argument against the former.

B. The "Old Rule" Cases.

From any survey of this Court's *Teague* cases, it is apparent that most of this Court's decisions in favor of defendants on full briefing and argument are ultimately held to establish new rules. That is not surprising, since this Court's discretionary certiorari jurisdiction is exercised primarily to resolve disagreements among the federal courts of appeals and state supreme courts, see Supreme Court Rule 10, and most disagreements among these high tribunals are reasonable. Even so, there are a few cases that resolved disputed questions on habeas in the petitioner's favor, and these must be reconciled with the other *Teague* cases if possible.

In *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), the defendant was a three-time rapist who murdered his third victim to keep her quiet. See *id.*, at 322. He claimed to be retarded.[3] In accordance with Texas law, the jury was instructed to answer the three Texas "special issues," and the sentence depended on the answer. See *id.*, at 310-311. In effect, the only mitigation

3. A jury has since found that Penry is not, in fact, retarded. Babineck, Texas Jury Rejects Rapist's Retarded Claim, Associated Press, July 3, 2002.

a jury can consider under this system is evidence relating to lack of deliberation or intent, nondangerousness in the future, or response to provocation by the victim.

If *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion)[4] and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982) were the only precedents involved, *Penry* would have been an easy case. In *Lockett*, the Ohio statute only allowed three circumstances to avoid a death sentence: victim facilitation of the offense, duress, or a mental defense. See 438 U. S., at 593-594. The plurality announced that states must allow consideration in mitigation of "*any* aspect of a defendant's character or record and any of the circumstance of the offense . . . ." *Id.*, at 604 (emphasis added).

After reviewing the 1976 decisions, including *Jurek* v. *Texas*, 428 U. S. 262 (1976), the *Lockett* plurality said, "None of the statutes we sustained in *Gregg* and the companion cases clearly operated at that time to prevent the sentencer from considering *any* aspect of the defendant's character and record or *any* circumstances of his offense as an independently mitigating factor." 438 U. S., at 607 (emphasis added). That statement was demonstrably false. Regardless of how broadly the Texas courts allowed the defendant to state his case to the jury, cf. *ibid.*, the law still required the jury to consider only the special issues, and it plainly did not allow other circumstances as "independently mitigating factor[s]."

Eddings confirmed that *Lockett* meant what it said and elevated its rule to majority opinion status. In a bench trial, the judge believed he could not consider Eddings' bad-childhood evidence in mitigation, and this was a violation of the *Lockett* rule. See 455 U. S., at 112-115.

4. Although Justice Blackmun's concurrence is the opinion on the "narrowest grounds," cf. *Marks* v. *United States*, 430 U. S. 188, 193 (1977), we refer only to the plurality opinion because of its later acceptance by the Court in *Eddings*.

Penry is not distinguishable from *Eddings*. Penry's retardation evidence, if believed, was no less an argument against the death penalty than Eddings' mitigation evidence. See 492 U. S., at 318-319. The bench-trial judge's understanding of the law is not distinguishable in any relevant way from jury instructions. See *Eddings*, 455 U. S., at 114.

The best argument of the state and the dissent for denying Penry's collateral attack on his sentence was that the Texas system used in his trial had been upheld in *Jurek*. See 492 U. S., at 355 (Scalia, J., dissenting). To make a petitioner's claim *Teague*-barred, the interpretation of precedent as contrary to the claim need only be reasonable. See *supra*, at 11. The *Penry* dissent's interpretation of *Jurek* was certainly reasonable. The problem is that this interpretation had already been nullified by the disingenuous mischaracterization of *Jurek* in *Lockett*.

Penry was a hard case because decisions of this Court conflicted with earlier decisions while trying to paper over the conflict, rather than expressly acknowledging it. Under *Teague*, as under AEDPA, a state court should be able to rely on any precedent of this Court that has not been overruled, if that precedent reasonably appears to be the closest to the case before it. See *Lockyer* v. *Andrade*, 538 U. S. 63, 155 L. Ed. 2d 144, 156-157, 123 S. Ct. 1166, 1173-1174 (2003); see also *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000) (equating AEDPA "clearly established" law with *Teague* "old rule"). *Penry* can be maintained within a coherent body of *Teague*/AEDPA jurisprudence only on the basis that *Penry* was "materially indistinguishable" from *Eddings*[5] and that the *Penry* dissent's interpretation of *Jurek*, however reasonable on the face of *Jurek*, did not survive *Lockett*. The simpler path, and the one that would form a more coherent body of jurisprudence,

5. Cf. *Andrade*, 155 L. Ed. 2d, at 157, 123 S. Ct., at 1174 ("Andrade's sentence also was not materially indistinguishable from the facts in *Solem*").

would be to simply acknowledge that *Penry*'s "new rule" holding is inconsistent with later developments in this area and is no longer good law. Under *Sawyer*, *O'Dell*, and *Lambrix* v. *Singletary*, 520 U. S. 518, 536 (1997), the reasonable interpretation of *Jurek* as contrary to Penry's claim should have been sufficient to make *Penry* a new rule.

Stringer v. *Black*, 503 U. S. 222 (1992) involved the question of invalidly vague "aggravating" circumstances. The jury found true the problematic "especially heinous, atrocious or cruel" circumstance, along with two crisply defined circumstances, and weighed all three against the mitigating factors in its final selection decision. *Id.*, at 225-226. Any one of the three would have made Stringer "death-eligible," *i.e.*, bringing him into the range where the jury had the discretion to impose a death sentence on the basis of "weighing."

The first issue was whether the holding of *Maynard* v. *Cartwright*, 486 U. S. 356 (1988), striking down identical language, was a new rule or merely an application of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). Mississippi did not contest that applying *Godfrey* to this language was not a new rule. "Especially heinous" is not distinguishable from "outrageously . . . vile," since both phrases merely take an adjective that applies to all murders and add an adverb of degree. See 486 U. S., at 364. The differences between the Georgia and Mississippi systems also do not distinguish the case in the direction against applying the rule. In Georgia, the aggravating circumstances as such have no further application after the defendant has been found death-eligible, while in Mississippi those same circumstances go on to be the exclusive factors weighed on the prosecution side in the penalty phase. See *Stringer*, 503 U. S., at 229-230. This is a difference that, if it has any effect, strengthens rather than weakens the argument for applying *Godfrey*.

The second issue was whether the *Godfrey* error was harmless under *Zant* v. *Stephens*, 462 U. S. 862 (1983) and *Barclay* v. *Florida*, 463 U. S. 939 (1983). On this point, it

becomes extremely difficult to reconcile *Stringer* with a "reasonable jurists could disagree" standard. See *Stringer*, 503 U. S., at 247-248 (Souter, J., dissenting). In terms of our proposed analysis in Part I-A, *Stringer* is more than arguably distinguishable from *Godfrey* in that the invalid eligibility factor was redundant. Both *Stevens* and *Barclay* had already distinguished *Godfrey* on that ground. See *id.*, at 245-247.

If *Stringer* can be reconciled with this Court's past definitions of "new rule," see, *e.g.*, *Lambrix*, 520 U. S., at 538 ("whether *no other* interpretation was reasonable"), or with our proposed formulation, it can only be because there is something different about harmless error analysis as opposed to basic rules of procedure. Uncertainty in whether a state can salvage a judgment with an admitted error arguably does not impact the state as severely as overturning judgments that were error-free under the law at the time they were rendered. Cf. *Sawyer* v. *Smith*, 497 U. S., at 234. If *Stringer* is not to be overruled, it should at least be limited to its harmless-error context.

In summary, then, a case decided after petitioner's conviction became final or a proposal made by petitioner in the present case is a new rule if either: (1) the case is distinguishable in an arguably material way from the precedents that petitioner claims dictate it; or (2) there were precedents that, at the time, could reasonably be interpreted as contrary to the rule. Observance of these limitations will assist in reducing litigation and confining the habeas writ to its underlying purpose, see *Parks*, 494 U. S., at 488, which is to " 'guard against extreme malfunctions in the state criminal justice systems.' " *Brecht* v. *Abrahamson*, 507 U. S. 619, 634 (1993) (emphasis added) (quoting *Jackson* v. *Virginia*, 443 U. S. 307, 332, n. 5 (1979) (Stevens, J. concurring in the judgment)). When the state courts decide the claim without violating the precedents in effect at the time, there has been no extreme malfunction, and the habeas inquiry properly ends there.

C. Mills as a New Rule.

Mills v. *Maryland* presents none of the problems that made *Stringer* and *Penry* difficult. None of this Court's pre-*Mills* capital cases resembled *Mills* anywhere near as closely as *Godfrey* resembled *Stringer* or *Eddings* resembled *Penry*. Instead, *Mills* follows the same pattern of extensions or proposed extensions of existing rules into new areas that we saw in *Parks*, *Sawyer*, *Taylor*, *Bohlen*, *O'Dell*, and *Teague* itself.

For the proposition that the jury instructions in *Mills* violated the Eighth Amendment, the *Mills* Court cited only three precedents: *Lockett*, *Eddings*, and *Skipper* v. *South Carolina*, *supra*. None of these cases involved an issue regarding *how* the sentencer went about answering the questions presented. *Lockett* and *Eddings* both involved constraints placed by law, or believed to be placed, on what the sentencing judge could consider. *Skipper*, 476 U. S., at 3, involved evidence withheld from the sentencing jury and therefore not considered by it at all.

In *Mills*, the jury was instructed to consider defendant's evidence of each mitigating factor and determine if he had proven that factor. See 486 U. S., at 387-388. In a broad sense, all the mitigating factors were "considered" by the sentencer. Whether federal constitutional constraints should go beyond what the sentencer as a whole must consider into the inner workings of the jury was very much an open question in 1988.

Whenever a defendant proposes extending federal control deeper into the workings of the state criminal justice system, the case is distinguishable from cases establishing more general requirements. The Eighth Amendment, in particular, does not "place within constitutional ambit micromanagement tasks that properly rest within the State's discretion to administer its criminal justice system." *Harris* v. *Alabama*, 513 U. S. 504, 512 (1995).

In *Teague*, the petitioner proposed extending the Sixth Amendment cross-section requirement past the drawing of the venire into the selection of the trial jury. See 489 U. S., at 299. The cross-section requirement itself was well-established law. The extension would have furthered the requirement's purposes, and four Justices thought it should be so extended. See *id.*, at 322 (Steven, J., concurring in the judgment); *id.*, at 341 (Brennan, J., dissenting). Federal control under the cross-section requirement had not extended to the petit jury before, see *id.*, at 301, so this further micromanagement would have been a new rule.

Parks involved a reliance on *Lockett* and *Eddings* in the same general sense that the Court of Appeals relied on those cases in the present case. The Court of Appeals in the present case believed that those cases established a "constitutional rule that the Eighth Amendment prohibits *all* barriers to the sentencer's consideration of any and all mitigating evidence . . . ." *Banks* v. *Horn*, 316 F. 3d 228, 235 (CA3 2003) (emphasis added). If they really had, then they would also, as Parks argued, have "required . . . that jurors be allowed to base the sentencing decision upon the sympathy they feel for the defendant after hearing his mitigating evidence." 494 U. S., at 489. But the Court rejected Parks' argument. "Parks asks us to create a rule relating, not to *what* mitigating evidence the jury must be permitted to consider in making its sentencing decision, but to *how* it must consider the mitigating evidence." *Id.*, at 490 (emphasis in original). This distinction is precisely on point in the present case.

When the evidence of a mitigating circumstance goes in to the jury room and is debated and voted on by the jury, that circumstance has been considered. *Parks* and *Mills* are therefore distinguishable from all of the cases before them where a mitigating circumstance had not been considered because the law did not allow it (*Lockett*), the sentencing judge thought the law did not allow it (*Eddings*), or the judge instructed the jury not to consider it. See *Hitchcock* v. *Dugger*,

481 U. S. 393, 398-399 (1987). *Parks* and *Mills* involve a finer level of detail in the state's capital sentencing structure, where federal regulation had not reached up to that point. The extension would have been new in *Parks*, and it was new in *Mills*.

Sawyer rejected an argument that the general principles of *Lockett* and *Eddings* dictated a rule on prosecutorial argument, when neither they nor any other Eighth Amendment case had addressed the prosecutor's arguments. See 497 U. S., at 236. The *Caldwell* rule pushed deeper into the traditional province of the states. *Gray* v. *Netherland*, 518 U. S. 152 (1996) similarly rejected, as a proposed new rule, an attempt to extend federal regulation to advance notice of the prosecution's evidence. See also *O'Dell* v. *Netherland*, 521 U. S., at 165-166 (informing jury about parole was previously considered policy choice for state).

Until *Mills* v. *Maryland*, this Court had interpreted the Eighth Amendment to require only that the sentencer not be precluded from considering the defendant's mitigating evidence. The internal workings of this jury as sentencer had not been subject to any Eighth Amendment regulation. *Mills* is unlike *Penry*, which involved an incompletely resolved conflict in this Court's precedents, and unlike *Stringer*, which involved the harm caused by an undisputed error. *Mills* is like the *Teague* cases where an existing rule was extended or proposed for extension into a new area. All of these were new rules, and *Mills* was a new rule.

II. Rules affecting only the discretionary sentencing decision should be categorically excluded from the second *Teague* exception.

"*Mills* changed nothing. In addition, *Mills* changed everything." That, in essence, is the holding of the Sixth Circuit in *Gall* v. *Parker*, 231 F. 3d 265, 322-324 (2000), declaring that *Mills* v. *Maryland*, 486 U. S. 367 (1988) was both an "old rule"

and a rule qualifying for the second exception to *Teague* v. *Lane*, 489 U. S. 288 (1989).

To qualify for "old rule" status under *Teague*, a rule must be "*dictated* by precedent." 489 U. S., at 301 (emphasis in original). To qualify for the second exception, a rule must be a "watershed rule[] of criminal procedure . . . [that] 'alter[s] our understanding of the bedrock procedural elements' . . . ." *Id.*, at 311 (emphasis omitted). These two categories are beyond distinct. They are separated by the Grand Canyon. A watershed rule is a rule of the revolutionary character of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). See *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990). It is not just a change in the law, but a dramatic change.

In his concurring and dissenting opinion in *Mackey* v. *United States*, 401 U. S. 667 (1971), Justice Harlan suggested an exception "for claims of nonobservance of those procedures that . . . are 'implicit in the concept of ordered liberty.' " *Id.*, at 693 (quoting *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937)). These are the very basic rules of fundamental fairness that were considered part of the Fourteenth Amendment's Due Process Clause even before the incorporation doctrine.[6] The purpose of this exception appears to be to explain Justice Harlan's continued concurrence in granting habeas relief to prisoners with claims under *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), which was then only eight years old.

While *Teague* adopted Justice Harlan's proposal in most other respects, it raised the bar for this exception even higher. To qualify for the second exception, a new rule would have to meet both the *Palko* test of fundamentalness and Justice Harlan's original proposal of " 'rules which significantly improve the pre-existing factfinding procedures.' " *Teague*,

6. The holding of *Palko* was that the Fifth Amendment's Double Jeopardy Clause was not such a rule. By the time of *Mackey*, the Double Jeopardy Clause was considered "incorporated," and *Palko* had been overruled. See *Benton* v. *Maryland*, 395 U. S. 784, 796 (1969).

489 U. S., at 312 (quoting *Desist* v. *United States*, 394 U. S. 244, 262 (1969)). Such a high standard raised the obvious question of whether any such rules remained to be made over a quarter century after *Gideon*. The *Teague* plurality answered cautiously, "we believe it unlikely that *many* such components of basic due process have yet to emerge." *Id.*, at 313 (emphasis added).

In the fourteen years since *Teague*, this Court has not found a single new rule to qualify for this exception. See *O'Dell* v. *Netherland*, 521 U. S. 151, 171 (1997) (Stevens, J., dissenting). It has found a great many rules and proposed rules that do not. A handful of circuit cases have found rules to qualify, but Congress had so little confidence in the Court of Appeals' decisions on retroactivity that it limited the retroactive rule exception for successive petitions to rules "made retroactive . . . by the Supreme Court." See 28 U. S. C. § 2244(b)(2)(A).

In the post-*Teague* cases, this Court has only marginally clarified the definition of the second exception. There are repeated statements along the lines that a qualifying rule would have to be of the "primacy and centrality" of *Gideon*. See *Parks*, 494 U. S., at 495.

The farther we go down the path of the evolution of criminal procedure, the less likely it becomes that any "absolute prerequisite to fundamental fairness," *Teague*, 489 U. S., at 315, remains unrecognized. Justice Stevens recognized the connection between the fundamental nature of a rule and the time of its recognition in his dissent in *Rose* v. *Lundy*, 455 U. S. 509, 544, and nn. 9-11 (1982), where he illustrated "fundamental" by reference to the "classic grounds" for habeas corpus —all rules which predate *Gideon*.

Tyler v. *Cain*, 533 U. S. 656 (2001) contains an important shift in language which recognizes this further diminution in the probability of the existence of any new, fundamental rule. There the Court said, "it is unlikely that *any* of these watershed rules 'ha[s] yet to emerge.' " *Id.*, at 667, n. 7 (emphasis added).

The shift from "many" in 1989 to "any" in 2001 recognizes that the probability is asymptotically approaching zero.

Because the second exception exists in theory, it must be litigated for every new rule in every circuit, except for the rules where this Court decides the question. Yet this Court cannot decide the question on every rule. The fact that the retroactivity of *Mills* remains undecided 15 years after that decision, despite long-standing circuit splits and numerous petitions for certiorari, vividly illustrates the problem. See, *e.g.*, Petition for Writ of Certiorari in *Dixon* v. *Williams*, No. 92-111 (requesting resolution of the circuit split eleven years ago). The *Teague* opinion denounced the "unfortunate disparity in the treatment of similarly situated defendants on collateral review" that resulted from varying decisions in the lower courts on retroactivity under the prior doctrine. 489 U. S., at 305. Yet the same result has followed under *Teague* from confusion over the second exception.

In the not-too-distant future, *amicus* CJLF believes it will be appropriate for the Court to accept that there are *no* rules of the "primacy and centrality of . . . *Gideon*" remaining to be made. The second exception can then be formally retired as unnecessary and the litigation it creates ended. For now, we propose a more limited curtailment. We propose a bright-line rule that new rules which govern the process of choosing a sentence within the range for which the defendant is eligible are *per se* outside the second exception.

Both this Court and the Congress have altered the law of habeas corpus over the course of the last thirty years with two goals in mind: to keep the writ available to correct fundamental miscarriages of justice and to curtail its misuse for endless relitigation of questions already reasonably resolved once. To reconcile these competing goals, new limitations on the writ have typically come with "actual innocence" exceptions. See *Murray* v. *Carrier*, 477 U. S. 478, 495-496 (1986); 28 U. S. C. § 2244(b)(2)(B)(ii). The unifying theme is to tighten restrictions in the interest of finality and federalism but relax them to

avoid a fundamental miscarriage of justice. The *Teague* rule is an important part of the tightening, and the second exception is based on the actual innocence consideration. See *Withrow* v. *Williams*, 507 U. S. 680, 699-700 (1993) (O'Connor, J., dissenting).

The second exception to *Teague* is closely related to the actual innocence exception of *Carrier*, as *Teague* itself makes clear. See 489 U. S., at 313. Application of this exception to capital cases is therefore illuminated by the two cases defining the *Carrier* exception: *Sawyer* v. *Whitley*, 505 U. S. 333 (1992) and *Schlup* v. *Delo*, 513 U. S. 298 (1995).

Sawyer noted that in an ordinary criminal case, the "fundamental miscarriage of justice" exception meant that the person was "actually innocent," which in turn simply meant that "the State has convicted the wrong person of the crime." See 505 U. S., at 340. In the context of capital sentencing, *Sawyer* rejected the argument that the concept extended beyond eligibility for the death penalty (*i.e.*, truth of at least one aggravating factor) to "the ultimate discretionary decision between the death penalty and life imprisonment." *Id.*, at 343. A "fundamental miscarriage of justice," for this purpose, means only a death sentence imposed on a person legally ineligible for it, not a sentence within the discretionary range. See *id.*, at 347. *Schlup* further distinguished actual innocence of the crime from ineligibility for the penalty. The greater importance of *real* innocence warranted a more relaxed standard for the exception to finality. See 513 U. S., at 324.

If we take the *Sawyer/Schlup* implementation of *Carrier* along with *Teague*'s reliance on *Carrier* for the second exception, a simple, clear, bright line becomes visible. Just as issues relating only to the discretionary sentencing decision *never* qualify for the "fundamental miscarriage of justice" exception of *Carrier*, so new rules relating only to the operation of that discretionary step *never* qualify for the second exception to *Teague*.

The bar for death-eligibility is very high. First, the defendant must be guilty of murder, not some lesser offense. See *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion). The class of murderers must be further narrowed by objective factors in the form of aggravating circumstances or a higher degree of murder. See *Tuilaepa* v. *California*, 512 U. S. 967, 971-972 (1994). The defendant must not qualify for a long and growing list of exclusion criteria. See *Thompson* v. *Oklahoma*, 487 U. S. 815, 838 (1988) (plurality opinion) (age); *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982) (minor accomplice without intent to kill); *Atkins* v. *Virginia*, 536 U. S. 304, 318 (2002) (mentally retarded). Once the case has cleared all those hurdles, it is difficult to imagine a case where the justice of the death penalty is not a matter of opinion on which reasonable people can and will differ.

A bright-line rule "is designed to avoid the costs of excessive inquiry where [it] will achieve the correct result in almost all cases." *Coleman* v. *Thompson*, 501 U. S. 722, 736 (1991). Categorically excluding the regulation of discretionary sentencing from the second *Teague* exception satisfies that criterion. The only rules in this area that are even arguably of the "primacy and centrality of . . . *Gideon*" are those of *Gregg* v. *Georgia*, 428 U. S. 153 (1976) and its companion cases. Since then, every defendant sentenced to death has been entitled to a narrowed definition of eligibility and an individualized consideration of mitigating circumstances. By comparison, all the rules created since then have amounted to fine tuning within these broad outlines.

The continued existence in theory of an exception which never applies in fact serves only to delay justice in cases where it is already long overdue and to squander resources better spent elsewhere. We have devoted far too large a share of our case review resources on the claims of unquestionably guilty murderers, claims which have nothing to do with guilt or innocence.

The only consequence of a *Teague* bar is that the habeas petitioner's sentence is judged by the standards in effect at the time of his direct appeal. See *Sawyer* v. *Smith*, 497 U. S. 227, 243 (1990). That includes all the requirements of *Gregg* and its companion cases. For issues having no relation whatever to actual innocence of the murder, that is sufficient to avoid a fundamental miscarriage of justice.

The rule of *Mills* v. *Maryland* has nothing to do with guilt of the offense and nothing to do with eligibility for the death penalty. Even its holding that the instruction risked the imposition of a death penalty despite compelling mitigating circumstances is far-fetched, for the reasons stated in Part III, below. The second-exception argument could be summarily dismissed, as this Court has done in many cases. See, *e.g.*, *Gray* v. *Netherland*, 518 U. S. 152, 170 (1996). However, a substantial step toward achieving the goals set out in *Teague* could be achieved by simply declaring the second exception to be *per se* inapplicable to rules governing the discretionary sentencing decision.

III. Even if *Mills* applies, both *Teague* and AEDPA require that the state court judgment stand.

A. Teague and AEDPA.

On state collateral review, the Pennsylvania Supreme Court chose not to rely on the nonretroactivity of *Mills* v. *Maryland*, 486 U. S. 367 (1988), but instead to rely on its earlier precedents holding that the Pennsylvania instruction in question does not violate *Mills*. See *Commonwealth* v. *Banks*, 656 A. 2d 467, 470 (Pa. 1995).[7] The state court's decision on the merits is

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7. The mandate of *Caspari* v. *Bohlen*, 510 U. S. 383, 389 (1994), that *Teague* be addressed as a threshold issue, is limited to the federal courts. Cf. *Johnson* v. *Fankell*, 520 U. S. 911, 919-920 (1997) (federal rule on interlocutory appeal in § 1983 case, created for the benefit of states and their officers, not binding on state court).

immune from collateral attack unless it is "contrary to, or involved an unreasonable application of," this Court's precedents. See 28 U. S. C. § 2254(d)(1).

The instruction and verdict form in this case were different from the ones in *Mills*, and the differences raise another but very similar issue. As is typical in *Teague* cases, there is a question whether the precedent the petitioner relies on is a new rule and a distinct question of whether extension of that precedent to cover this case would be another new rule. See *Stringer* v. *Black*, 503 U. S. 222, 228 (1992). However, when the state court has ruled on the merits and § 2254(d)(1) applies, this second-step *Teague* inquiry is subsumed in the AEDPA inquiry. Any extension of the precedent that would be "new" for *Teague* is not "clearly established" for AEDPA. See *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000). Any rule which is not "clearly established" cannot be used to avoid § 2254(d)'s limitation on granting relief. See *Lockyer* v. *Andrade*, 538 U. S. 63, 155 L. Ed. 2d 144, 155-156, 123 S. Ct. 1166, 1173-1174 (2003).

B. Two Kinds of Unanimity.

A requirement that the jury reject and not consider any mitigating circumstance on which it is not unanimous is a violation of the *Mills* rule. On the other hand, a requirement that the jury continue deliberating until it is unanimous *one way or the other* is perfectly valid. See *McKoy* v. *North Carolina*, 494 U. S. 433, 455, n. * (1990) (Kennedy, J., concurring in the judgment). The Court of Appeals in this case completely failed to recognize the distinction. This argument is presented in our brief at the petition stage, and space does not permit its repetition here. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in Support of the Petition for Writ of Certiorari in *Beard* v. *Banks*, No. 02-1603, pp. 11-16.

C. The Boyde Criterion.

There is another point which apparently needs to be reiterated. The Court of Appeals in this case relied on *Mills* v. *Maryland* for the proposition that "the critical question is . . . whether a reasonable jury *could* have interpreted the instructions in an unconstitutional manner . . . ." *Banks* v. *Horn*, 271 F. 3d 527, 544 (CA3 2001) (emphasis added). *Mills* did indeed say that, as the dissenters so vigorously asserted in *Boyde* v. *California*, 494 U. S. 370, 390 (1990) (Marshall, J., dissenting) ("unequivocally confirmed"). However, the *Boyde* majority found the precedents as a whole unclear and adopted the "reasonable likelihood" standard. *Id.*, at 380. *Mills* is simply no longer good law on this point.

The Court of Appeals in this case was oblivious to the distinction between the *Mills* standard and the *Boyde* standard, and it cited them interchangeably as if they were the same. Indeed, in the very same paragraph in which the court cites the discredited *Mills* standard, it also cites *Boyde*. See 271 F. 3d, at 544.

The "reasonable likelihood" inquiry of *Boyde* allows the reviewing court to give the jurors some credit for common sense. The *Mills* Court agonized over the nightmare scenario of a jury that felt compelled to return a verdict of death even though eleven agreed that life was the proper verdict, or even if all twelve agreed but for different reasons. See 486 U. S., at 373-374. Applying *Boyde* to an arguably ambiguous instruction, we must ask how realistic it is that the twelve jurors would adopt the interpretation that forces them to a result that most or all of them believe to be unjust, when there is another interpretation available that would produce the result they believe is right. We should not analyze a jury instruction like a digital electronic circuit, tracing down every conceivable path. See *Cupp* v. *Naughten*, 414 U. S. 141, 149 (1973) ("abstract and conjectural emanations"). Under *Boyde*, we ask what is realistic.

Jurors have enough sense to know that the final verdict is what is really important. Even when they are unambiguously instructed to reach an agreement on intermediate findings, they will typically put aside disagreements and mark whatever steps are needed to reach the agreed-upon conclusion. See Ginsburg, Special Findings and Jury Unanimity in the Federal Courts, 65 Colum. L. Rev. 256, 268 (1965).

The verdict form in *Mills* unambiguously required unanimity to mark a mitigating circumstance "yes" and omitted the word "unanimously" for marking a circumstance "no." See 486 U. S., at 387. The verdict form in the present case is substantially different. It refers to unanimity only with regard to the ultimate issue. "We the jury have found unanimously . . . One or more aggravating circumstances which outweigh any mitigating circumstance or circumstances." *Banks* v. *Horn*, 271 F. 3d, at 549-550 (emphasis omitted). Applying the clearly established law of *Boyde*, a court could reasonably conclude there is no reasonable likelihood that the jurors interpreted the form in the unjust way, contrary to common sense, feared by the *Mills* Court. Indeed, that conclusion is not only reasonable, it is correct.

In this case, the highest court of the state and the federal court of appeals simply disagree. The state court has not acted in a renegade manner. It recognized the controlling precedents of this Court, applied them to the facts, and reached a result well within the bounds of reasonable disagreement among competent, conscientious jurists. Congress has decided that in such circumstances the state court judgment should stand, unless reviewed by this Court on certiorari.

CONCLUSION

The decision of the Court of Appeals for the Third Circuit should be reversed.

November, 2003

Respectfully submitted,

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(9)

Supreme Court, U.S.
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No. 02-1603

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, *et al.*,

Petitioners,

v.

GEORGE E. BANKS,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

BRIEF FOR AMICUS CURIAE PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED AND QUESTION ADDRESSED BY AMICUS PACDL

1. Was the decision in *Mills v. Maryland*, 486 U.S. 367 (1988), dictated by this Court's precedents in existence at the time respondent's conviction became final?

2. Was the Pennsylvania Supreme Court's decision in this case "contrary to" and an "unreasonable application of clearly established Federal law" within the meaning of 28 U.S.C. § 2254(d)(1)?

This brief amicus curiae addresses only the first of the questions presented.

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BRIEF OF AMICUS CURIAE PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF RESPONDENT

The Pennsylvania Association of Criminal Defense Lawyers files this amicus curiae brief pursuant to this Court's Rule 37.3(a) in support of respondent George E. Banks. The petitioners and the respondent have both granted consent to file this brief, and letters of consent have been filed with the Clerk of this Court.*

INTEREST OF AMICUS

The Pennsylvania Association of Criminal Defense Lawyers, known as PACDL, is a Pennsylvania nonprofit corporation established in 1988, whose membership comprises over 600 public and private criminal defense attorneys from throughout the Commonwealth. An affiliate of NACDL, the Association attempts, as stated in its by-laws, "to foster, maintain and encourage the integrity, independence and expertise of the defense lawyer in criminal cases"; "to achieve justice and dignity for defense lawyers, defendants and the criminal justice system itself"; "to protect and insure by rule of law, those individual rights guaranteed by the Pennsylvania and United States Constitutions"; and "to promote the proper administration of criminal justice." PACDL is the only statewide organization working strictly on behalf of the professional interests of public and private criminal defense lawyers, including the

* No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than PACDL and its membership, made any monetary contribution to its preparation or submission. *See* Rule 37.6.

rights of their clients. Many of PACDL's most active and dedicated members have a substantial commitment to the defense of capital cases. The members of PACDL are united in their support of keeping the cherished privilege of access to habeas corpus open as a safeguard for the protection of the federal constitutional rights of our clients. PACDL filed a brief and participated in argument before the Third Circuit in this case. This *amicus* brief arises out of our members' dedication to the preservation of our system of justice.

INTRODUCTORY SUMMARY OF FACTS AND OF THE CASE

George Banks, the respondent, who was suffering from a severe mental illness characterized by fixed delusional beliefs, committed multiple murders. After a trial and penalty phase proceeding before a jury, he was convicted and sentenced to death. The jury reported that it had found one out of three mitigating circumstances proffered by Banks, and one aggravating circumstance. While acknowledging that Banks "suffers and has suffered from a mental defect that contributed to his bizarre behavior," the Pennsylvania Supreme Court affirmed his convictions and death sentences. *Commonwealth v. Banks*, 521 A.2d 1, 15 (Pa.) ("*Banks I*"), *cert. denied*, 484 U.S. 873 (1987). The state courts also denied Banks' first petition for state post-conviction relief, in which he raised a claim that the jury instructions and verdict sheet violated *Mills v. Maryland*, 486 U.S. 367 (1988). *See Commonwealth v. Banks*, 656 A.2d 467, 470 (Pa.) (JA 119-38) ("*Banks II*"), *cert. denied*, 516 U.S. 835 (1995).

Banks' first federal petition for a writ of habeas corpus was ultimately dismissed without prejudice, pending exhaustion of certain claims. See *Banks v. Horn*, 126 F.3d 206 (3d Cir. 1997). After Banks unsuccessfully completed the required exhaustion of state remedies, he refiled his petition. The Third Circuit ordered that penalty phase relief be granted to Banks on his *Mills* claim. *Banks v. Horn*, 271 F.3d 527 (3d Cir. 2001) ("*Banks III*"). The Third Circuit ruled that the jury instructions and verdict sheet violated *Mills*, that no retroactivity analysis under *Teague v. Lane*, 489 U.S. 288 (1989), was required because the state court had ruled on the merits of the *Mills* claim, and that the state supreme court's denial of the *Mills* claim was an unreasonable application of *Mills*. This Court granted the Commonwealth's *certiorari* petition, vacated the Third Circuit's judgment, and remanded for a *Teague* analysis. *Horn v. Banks*, 536 U.S. 266 (2002) (*per curiam*) ("*Banks IV*"). On remand, the Third Circuit majority concluded that the result in *Mills* had been dictated by prior precedent, primarily this Court's *Lockett* line of decisions. *Banks v. Horn*, 316 F.3d 228 (3d Cir. 2003) ("*Banks V*"), referencing *Lockett v. Ohio*, 436 U.S. 586 (1978).

This Court granted *certiorari* again on Sept. 30, 2003.

SUMMARY OF ARGUMENT

This Court's decision in *Mills v. Maryland*, 486 U.S. 367 (1988), did not announce a new rule of law; rather, it was dictated by then-existing precedent. In addition to the line of cases under *Lockett v. Ohio*, 436 U.S. 586 (1978), which disallows limitation of jury consideration of mitigating circumstances, as primarily relied on by the Court, *Mills* was also dictated by the Court's decisions under the Eighth and Fourteenth Amendments prohibiting arbitrary capital sentencing procedures.

The jury instructions and verdict sheet used in *Mills* (and in this case) were likely understood by the jury as requiring all jurors to find any particular mitigating factor

unanimously before they could weigh that factor against the aggravating factor(s) established by the State. As a result, a single juror's disagreement could block the jury as a whole from weighing mitigating against aggravating circumstances in cases where all the jurors thought there was substantial mitigation. Allowing a single juror to compel a death sentence by simply refusing to find any mitigating circumstance, or to find a certain one – even circumstances which all the other jurors were convinced had been established – was aptly characterized by this Court as the "height of arbitrariness." *Mills*, 486 U.S. at 374. The sentencing process created by the jury instructions and verdict sheet was arbitrary – in violation of *Furman v. Georgia*, 408 U.S. 232 (1972), *Gregg v. Georgia*, 428 U.S. 153 (1976), *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985) – in that it failed to provide for a rational, predictable and neutral sentencing process. In other words, it failed to provide the heightened reliability required by the Eighth Amendment.

That conclusion is dictated by this Court's existing precedents as of 1987 – the earliest date when respondent's conviction could be deemed to have become final. In addition to establishing a general prohibition against arbitrariness in capital sentencing, those precedents contain specific requirements that were violated in *Mills* and here. First, *Caldwell* and other decisions establish that the State may not materially misinform the jury concerning its role in the sentencing process. In *Mills* and here, the instructions and verdict sheet appeared to set up a sentencing scheme different from the one established by the Commonwealth's capital sentencing statute, rendering the process arbitrary and unpredictable. Second, this Court's arbitrariness precedents establish that the capital sentencing process must not operate in a manner that is biased in favor of the death sentence. By enabling a single juror to preclude other jurors

from weighing mitigating factors, the verdict sheet's (and instructions') mistaken jury unanimity requirement skewed the capital sentencing process in favor of death, making it biased and therefore arbitrary.

ARGUMENT

MILLS WAS DICTATED BY TWO INDEPENDENT LINES OF THIS COURT'S THEN-EXISTING PRECEDENT.

In *Teague v. Lane*, 489 U.S. 288 (1989), a plurality proposed that, subject to very narrow exceptions, habeas petitioners may not obtain habeas relief based on "new" rules that were announced after their convictions became final. This doctrine was adopted by the Court in *Penry v. Lynaugh*, 492 U.S. 302 (1989), *overruled on other grounds*, *Atkins v. Virginia*, 536 U.S. 304 (2002). Under *Teague*, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States." *Id.* at 301. On the other hand, if a holding is dictated by existing precedent, it is not "new." *Id.*; *Penry*, 492 U.S. at 319.

Petitioners assert that *Mills* announced a new rule when it was decided in 1988, and therefore that Banks is not entitled to rely on *Mills*. Assuming *arguendo* that Banks' conviction became final in 1987,[1] he can still rely on *Mills*,

[1] Ordinarily, the finality date for Banks would be October 5, 1987, when this Court denied his *certiorari* petition. Banks argues that the finality date should be 1995, when the Pennsylvania supreme court denied his post-conviction petition; concurring in the judgment of the court below, Judge Sloviter agreed with this analysis. *See Banks V*, 316 F.3d at 255. Obviously, if Banks' conviction was not final for *Teague* purposes until 1995, he is entitled to rely on *Mills*. For purposes of the argument presented here, amicus PACDL assumes that Banks' conviction became final in 1987.

because the result in *Mills* was dictated by existing precedent within the meaning of the *Teague* doctrine.

This Court made clear in *Mills* that, even before *Mills* was decided, it was already "well established," under *Lockett v. Ohio*, 436 U.S. 586 (1978), and its progeny, that the Eighth Amendment prohibits *any* "barrier to the sentencer's consideration of all mitigating evidence." *Mills*, 486 U.S. at 374-75. Furthermore, this court found that, under *Lockett*, this rule "must be" applied to a "single holdout juror's vote against finding the presence of a mitigating circumstance." *Id.* Thus, as the Third Circuit found, *Banks V*, 316 F.3d at 235-45, and as Respondent argues in his Brief, *Mills* was compelled by *Lockett* and its progeny.

In addition to relying on the *Lockett* line of cases, in *Mills* this Court found that it would be the "height of arbitrariness to allow or require the death penalty," where either a single juror's vote against finding mitigating circumstances, or the failure of all the jurors to agree unanimously as to any of the mitigating circumstances, would preclude the jurors from weighing any of the proffered mitigating circumstances. *Mills*, 486 U.S. at 373-74. In *Mills* and *McKoy v. North Carolina*, 494 U.S. 433 (1990), the Court majorities evidently conceived of the "arbitrariness" of such a proceeding as arising from the *Lockett* violation. *Compare McKoy*, 494 U.S. at 440 (in *Mills*, "we held that it would be the 'height of arbitrariness to allow or require the imposition of the death penalty' where 1 juror was able to prevent the other 11 from *giving effect* to mitigating evidence") *with Penry v. Lynaugh*, 492 U.S. 302, 318 (1989) (*Lockett* prohibits states from preventing the sentencer "from considering and *giving effect* to [mitigating] evidence").

In *McKoy*, however, Justice Kennedy expressed a different view. Justice Kennedy suggested that the result in *Mills* should be predicated not on *Lockett*, but on the Eighth

Amendment prohibition against arbitrariness in capital sentencing proceedings. According to Justice Kennedy:

> Application of the death penalty on the basis of a single juror's vote is "intuitively disturbing." [*Mills*, 486 U.S. at 374]. More important, it represents imposition of capital punishment through a system that can be described as arbitrary or capricious. The Court in *Mills* described such a result as the "height of arbitrariness." *Ibid.* Given this description, it is apparent that the result in *Mills* fits within our line of cases forbidding the imposition of capital punishment on the basis of "caprice," in "an arbitrary and unpredictable fashion," or through "arbitrary" or "freakish" means.

McKoy, 494 U.S. at 454 (Kennedy, J., concurring). As Justice Kennedy further noted, "Given the reasoned, moral judgment inherent in capital sentencing by the jury, the extreme arbitrariness of this potential result is evident." *Id.*

For *Teague* purposes, the question raised by Justice Kennedy's concurrence is whether the result in *Mills* was "dictated by" the Eighth Amendment arbitrariness principle, as well as or apart from the *Lockett* principle relied on by the majority in *Mills* and *McKoy*. For the reasons that follow, it was so dictated.

Going back to the unifying principle underlying the separate opinions comprising the seminal decision of *Furman v. Georgia*, 408 U.S. 232 (1972), this Court has made clear that capital sentencing schemes must "be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." *California v. Brown*, 479 U.S. 538, 541 (1987) (citing *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Furman*). The schemes involved in *Mills* and here (created by faulty and misleading instructions, coupled with an even more misleading verdict form,

not by the Maryland or Pennsylvania statute) allowed a lone juror's refusal to find a single mitigating circumstance, or the failure of all jurors to agree on any particular mitigating circumstance, to preclude the rest of the jury from weighing *any* mitigating circumstances.

In either event, the effective result was a mandatory death sentence, as long as the State had proven the existence of even a single aggravating circumstance. *See Mills*, 486 U.S. at 373-74; *McKoy*, 494 U.S. at 452 (Kennedy, J. concurring) (such a scheme "can allow the ... requirement of unanimity to produce a capital sentence that lacks unanimous support of the jurors, and, more than this, is thought to be inappropriate by 11 of the 12."). And even if all jurors were convinced on one mitigating circumstance, a single juror could still prevent the rest from weighing other mitigating evidence that they were convinced the defense had established.

There can be little question that adding a jury unanimity requirement for mitigators, which is not even present in the capital sentencing statute,[2] introduces an arbitrary and unpredictable element into the sentencing process that is inconsistent with the requirements of predictability, rationality and heightened reliability in capital sentencing that have been enshrined in Eighth Amendment jurisprudence since *Furman*. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (discussing need for heightened reliability in capital sentencing proceedings). Accordingly, as Justice Kennedy reasoned in *McKoy*, the conclusion that a jury unanimity requirement is impermissibly arbitrary "fits within," *McKoy*, 494 U.S. at 454, the core principles of this Court's Eighth Amendment arbitrariness decisions.

[2] *See Commonwealth v. Williams*, 570 A.2d 75, 82 (Pa. 1990) ("our statute does not require unanimity in establishing mitigating circumstances"); *Commonwealth v. Frey*, 554 A.2d 27, 31 (Pa. 1989) ("The perceptions of even one juror, alone, with regard to mitigating circumstances, would be sufficient to deny the unanimity required for a sentence of death.").

Standing alone, it might be that the prohibition against arbitrariness in capital sentencing is too general a principle to "dictate" the result in *Mills*. *See Gilmore v. Taylor*, 508 U.S. 333, 344 (1993) ("the level of generality at which respondent invokes this line of cases is far too great to provide any meaningful guidance for purposes of our *Teague* inquiry"). Well before Banks' presumed finality date of 1987, however, this Court had articulated more specific arbitrariness principles that dictate the result in *Mills*.

First, Pennsylvania's capital sentencing statute does not require that jury findings with respect to mitigation be unanimous. Nevertheless, the jury instructions and verdict sheet *did* seem to require unanimity. As a result, the trial court misled the jury into thinking that it had to be unanimous, violating the Eighth Amendment's requirement of heightened reliability in capital sentencing proceedings. Second, the instructions and verdict sheet requiring unanimity on mitigation created a bias in favor of death. In a neutral system, the jurors would either decide individually whether mitigating circumstances were established, or a mistrial would be declared if the jurors were not unanimous. The system created by the instructions and verdict sheet here and in *Mills* — in which no mitigating factors are found unless the jury is unanimously convinced of them, and in which mitigating evidence that is not "found" cannot be "weighed" — places the entire risk of non-unanimity on the defendant. Such a system is biased in favor of death. It was therefore already clearly forbidden in 1987, under this Court's long-standing precedents.

1. The jury instructions and verdict sheet misled the jury into thinking unanimity was required to find mitigating circumstances.

The jury charge and verdict sheet misled the jury into believing it had to find mitigating factors unanimously before it could weigh those factors against the aggravating factors. The Pennsylvania capital sentencing statute does *not* require that jurors be unanimous in order to find and weigh mitigating factors, but rather allows jurors to weigh whatever mitigating factors they individually find by a preponderance of the evidence. *See Banks II*, JA 124; *Commonwealth v. Frey*, 554 A.2d 27 (Pa. 1989). Nevertheless, as discussed in detail in Respondent's Brief, the instructions and verdict sheet likely led the jury to believe that unanimity *was* required to find and weigh mitigating factors. The instructions and verdict sheet thus misled the jury as to its role in the sentencing process under Pennsylvania law.

Such misleading of the jury contravenes the long-standing Eighth Amendment guarantee of heightened reliability in capital sentencing, which is one aspect of the prohibition against arbitrariness in capital sentencing. *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985); *Lockett*, 438 U.S. at 604; *Woodson*, 428 U.S. at 305. It is self-evident that a sentencing jury that misunderstands how it is to carry out its role in the statutory sentencing process cannot provide the kind of heightened reliability required by the Eighth Amendment. Indeed, in *Caldwell*, this Court held (in 1985) that the "jury must not be misled regarding the role it plays in the sentencing decision." *Romano v. Oklahoma*, 512 U.S. 1, 8 (1994).[3]

[3] That was the position adopted by Justice O'Connor. 472 U.S. at 343. Her opinion provided the decisive fifth vote, and thus, because it was not inconsistent with the plurality's position, constitutes the holding of *Caldwell*. *See Romano*, 512 U.S. at 9.

Thus, the holding of *Caldwell* – that the State may not materially mislead the jury concerning its role in the sentencing process – dictated the result in *Mills*, as it dictates affirmance here. Both in *Mills* and in respondent's case, the jury instructions and verdict forms misled the sentencing juries into believing they must be unanimous to find mitigating circumstances, when in fact state law contained no such requirement. Propounding such disinformation to the jury introduces a constitutionally unacceptable level of arbitrariness into the capital sentencing process, as was clear at least by 1985, when this Court decided *Caldwell*.

2. The jury instructions and verdict sheet created a bias in favor of a death sentence for respondent, in violation of the Eighth and Fourteenth Amendments.

As this Court's precedents make clear, the Eighth Amendment's prohibition against the arbitrary imposition of the death sentence forbids a State, through the Fourteenth Amendment's Due Process guarantee, from imposing capital punishment on the basis of proceedings that are biased in favor of death. *Stringer v. Black*, 503 U.S. 222, 235-36 (1992) (presence of an invalid aggravating factor in a weighing State would create an impermissible "bias in favor of the death penalty"); *Caldwell*, 472 U.S. at 330-33 (misleading argument about appellate review creates "intolerable danger of bias toward a death sentence"); *California v. Ramos*, 463 U.S. 992, 1010-12 (1983) (accurate instruction about Governor's commutation power permissible, because it would not result in bias in favor of death sentence). The effect of the jury instructions and verdict sheet here was that anything less than a unanimous vote in favor of a mitigating circumstance resulted in a failure to "find" that circumstance, removing it from the weighing process. As a result, the process was arbitrarily – and unconstitutionally – skewed towards death.

Petitioners here attempt to compare the erroneous jury unanimity requirement to a requirement that mitigating factors be established by a preponderance of the evidence – a provision that this Court found constitutionally acceptable (post-*Mills*) in *Walton v. Arizona*, 494 U.S. 639, 649-51 (1990) (plurality opinion), *overruled on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2002). See *Brief for Petitioners* at 21 n.11. This comparison does not begin to withstand scrutiny.

The burden-of-proof requirement approved in *Walton* merely established a threshold for the jury to use in deciding whether the mitigating evidence presented was sufficiently credible to be placed in the weighing process. The unanimity requirement – as it operated here – meant that a single juror (or two or three) could prevent all the other jurors from weighing mitigating evidence that they were absolutely convinced had been established, and which they believed demanded a life sentence. Whether a jury unanimity requirement operates neutrally, or is biased in favor of one side or the other, depends on what happens if the jury is *not* unanimous. If a non-unanimous jury results in a mistrial, the requirement is neutral. If either side *wins* on the basis of non-unanimity, the requirement is biased against the losing side. Here, unless the defendant (respondent) convinced all twelve jurors that a mitigating circumstance had been established, none of the jurors could weigh evidence that might otherwise have resulted in a life sentence.[4]

[4] Petitioners attempt to make an analogy to decisions purportedly holding that unanimity requirements are permissible with respect to affirmative defenses in criminal cases. *Brief for Petitioners* at 21 n.11 (citing *Martin v. Ohio*, 480 U.S. 228 (1987); *Patterson v. New York*, 432 U.S. 197) (1977); *Rivera v. Delaware*, 429 U.S. 877 (1976) (mem.)). In fact, all of those decisions deal with burden-of-proof requirements, *not* unanimity rules. While this Court has not addressed a unanimity requirement with respect to an affirmative defense, most decisions in

Accordingly, the requirement mistakenly imposed by the jury instructions and verdict form in this case was impermissibly biased in favor of a death sentence. Given this Court's clear statements in *Stringer*, *Caldwell* and *Ramos* that such death-prone proceedings violate the Eighth Amendment, and the more general requirement of heightened reliability in capital sentencing, the result in *Mills*, which invalidates those instructions and that verdict form, was dictated by this Court's pre-1987 precedent.

(cont'd)

non-capital cases have rejected such requirements, on various grounds. *See Jazzabi v. Allstate Ins. Co.*, 278 F.3d 979, 982-85 (9th Cir. 1992) (collecting such criminal cases, while discussing issue in context of civil litigation). *A fortiori*, the jury unanimity requirement here, which allowed any non-unanimity to compel a sentence of death, violated the Eighth Amendment's prohibition against arbitrariness in capital sentencing.

CONCLUSION

The Pennsylvania Association of Criminal Defense Lawyers urges that the decision of the United States Court of Appeals for the Third Circuit be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JEFFREY A. BEARD, ET AL.,

Petitioners,

—v.—

GEORGE E. BANKS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF PENNSYLVANIA, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

I. Does the *Teague* doctrine bar a federal habeas court from entertaining Mr. Banks' claim?

II. If Mr. Banks' claim can be considered, is federal habeas relief barred by 28 U.S.C. §2254(d)?

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INTEREST OF THE AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. The ACLU of Pennsylvania is one of its statewide affiliates. In this case, the United States Court of Appeals for the Third Circuit held that the prisoner, Mr. Banks, was sentenced to death in violation of his Eighth Amendment right against cruel and unusual punishment. The Commissioner of the Pennsylvania Department of Corrections, Mr. Beard, and his *amicus*, the Criminal Justice Legal Foundation, challenge not only the circuit court's conclusion, but its methodology. Accordingly, this case raises issues of fundamental importance to the ACLU and its members about the appropriate rules governing habeas corpus.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. The NACDL was founded in 1958 to

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

promote criminal-law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal-defense counsel. The NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving federal habeas corpus. In furtherance of this and its other objectives, the NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal-justice issues.

INTRODUCTION AND SUMMARY OF ARGUMENT

The circuit court below correctly determined that Mr. Banks' Eighth Amendment claim is not foreclosed by *Teague v. Lane*, 489 U.S. 288 (1989); that the Pennsylvania Supreme Court reached an erroneous judgment regarding that claim; and that federal habeas corpus relief is not barred by 28 U.S.C. §2254(d), enacted as part of the Anti-Terrorism and Effective Death Penalty Act of 1996. Those issues are fully addressed in other briefs. To avoid duplication, this brief focuses on the relationship between the *Teague* doctrine and §2254(d), a question that has importance in this case and many others.

The Commissioner, and his *amicus*, the Criminal Justice Legal Foundation (CJLF), ask the Court to embrace an understanding of *Teague* that is incompatible with §2254(d). By their account, *Teague* bars a claim from consideration in federal collateral proceedings unless a state court acted or might have acted unreasonably by rejecting the claim on the merits in the particular circumstances of a prisoner's case. If that were true, the existence of *Teague* would render §2254(d) superfluous.

Section 2254(d) is triggered by a previous state court decision on the merits. In the wake of such a state court

decision, a federal habeas court cannot grant relief to a prisoner solely on the ground that the state court decision was erroneous. The state court decision must also have constituted an unreasonable application of "clearly established Federal law, as determined by the Supreme Court of the United States."[2] Within that formulation, "clearly established" law refers to the rules of law established by this Court's holdings at the time of the state court decision.

According to the Commissioner and his *amicus*, however, *Teague* alone forecloses federal habeas relief with respect to a claim if it would not have been unreasonable for a state court to deny the claim in previous state proceedings.. If that were true, *Teague* would perform the work that Congress has assigned to §2254(d) — and would do so even in the absence of the condition that Congress has specified for withholding federal relief: an *actual* state court decision on the merits. More specifically, the *Teague* doctrine would stop a claim at the door unless it would have been unreasonable for a state court to reject it, whether or not a state court actually *did* reject it. That understanding of *Teague* fights the explicit text of §2254(d).

The Commissioner and his *amicus* resist this Court's efforts to delineate different functions for *Teague* and the statute. The *Teague* doctrine determines whether a claim may be advanced in federal collateral proceedings. It does so by screening claims at the threshold, admitting only claims resting on rules of federal law that existed at the time the prisoner's conviction and sentence became final on direct review. This Court's precedents refer to such a pre-existing

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[2] Under §2254(d), a federal court may also award relief if the state court's decision was "contrary to" relevant holdings of this Court or if it was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." In the interest of simplicity and clarity, we do not address those possibilities in this brief.

rule of law as an "old" rule. The best understanding of what counts as an "old" rule within the meaning of *Teague* is a rule that was clearly established by this Court's holdings at the relevant time.

The *Teague* doctrine and §2254(d) operate from the same baseline: rules of law established by this Court's prior holdings. But *Teague* and the statute refer to those rules of law for different reasons. The *Teague* doctrine lets claims based on rules established by this Court's holdings in the door; the statute determines whether a state court's application of such a rule bars relief.[3] In this case, *Teague* allows consideration of Mr. Banks' claim regarding the way his jury was instructed because that claim fairly rests on the pertinent rule of law established by this Court's holdings when Mr. Banks' sentence was subject to direct review. Since the Pennsylvania Supreme Court rejected Mr. Banks' claim on the merits, §2254(d) comes into play. Yet the statute does not bar federal relief because the state court's application of the "old" rule was unreasonable.

The Commissioner and his *amicus* contend that certain of this Court's descriptions of *Teague* support the argument that *Teague* forecloses federal habeas adjudication unless it would have been unreasonable for a state court to reject a prisoner's claim in the circumstances of the particular case. There are four reasons why those descriptions of *Teague* should not be read to bear that meaning.

First, most of the descriptions of *Teague* on which the Commissioner and his *amicus* rely appeared before §2254(d)

[3] The *Teague* doctrine and §2254(d) focus on this Court's holdings as they were at different times. The *Teague* doctrine works from baseline holdings at the time a prisoner's conviction and sentence became final on direct review. The statute works from holdings at the time a state court rejected a claim on the merits.

was enacted. They have been repeated without re-examination following the statute's passage, but they no longer accurately reflect this Court's decisions identifying the different spheres in which *Teague* and §2254(d) operate.

Second, those descriptions neglect the elaboration of *Teague* in *Wright v. West*, 505 U.S. 277 (1992). Justice Thomas' opinion in that case suggested that *Teague* might implicitly support the proposition that federal habeas courts should defer to reasonable state court decisions applying federal legal standards in particular cases. Yet the Court did not adopt that view. In separate opinions, Justices O'Connor, Kennedy, and Souter explained that *Teague* only ensures that federal courts do not effectively upset state judgments on the basis of changes in the law.

Third, even taken at face value, the descriptions do not have to be read in the way the Commissioner and his *amicus* read them. As described below, they just as easily lend themselves to a quite different interpretation more in keeping with the Court's explanations of *Teague* and §2254(d) in recent cases.

Fourth, the descriptions of *Teague* on which the Commissioner and his *amicus* rely played no significant role in this Court's cases actually deciding whether prisoners were entitled to advance claims in federal collateral proceedings. Instead, the Court invariably examined the rules established by its own relevant holdings to determine whether a claim could be entertained.

ARGUMENT

I. SECTION 2254(d) DETERMINES WHETHER A FEDERAL COURT CAN AWARD RELIEF WITH RESPECT TO A CLAIM; THE *TEAGUE* DOCTRINE DETERMINES WHETHER A FEDERAL COURT CAN ENTERTAIN THE CLAIM IN THE FIRST PLACE

The Commissioner and his *amicus* invite the Court to adopt an understanding of the *Teague* doctrine that would have *Teague* eclipse §2254(d). By their account, *Teague* forecloses any claim advanced in federal collateral proceedings unless it would have been unreasonable for a state court to reject the claim at the time the prisoner's conviction and sentence became final. That understanding of *Teague* is flatly inconsistent with Congress' decision, reflected in §2254(d), to attend to the reasonableness of a prior state court decision later—at the stage of a habeas case when the federal court determines whether it can award relief with respect to a claim it regards as meritorious. In explicit terms, §2254(d) specifies that federal habeas relief is barred only if: (1) there is an actual previous state court decision rejecting the claim on the merits; and (2) the prior state court decision was both erroneous and also unreasonable.

This case provides an occasion to differentiate §2254(d) from *Teague*. Over the last eight years, the Court has rendered numerous decisions discussing §2254(d), other provisions of AEDPA, and related features of federal habeas law including *Teague*. Each decision in turn addressed a particular question raised by the Act's interface with the Court's own pre-existing case law. We respectfully submit that it is appropriate now to lay all the pieces to the puzzle on the table at the same time and to fit them together in a coherent whole.

Prior to 1996, it was a matter of debate whether federal habeas corpus should be affected by a reasonable state court decision on the merits of a federal claim. Congress resolved the matter by enacting §2254(d) as part of the Anti-Terrorism and Effective Death Penalty Act. Section 2254(d) directs a federal court's attention to a previous state court adjudication of the merits of a federal claim and instructs the federal court to determine whether that adjudication produced a decision involving "an unreasonable application of. . . clearly established Federal law, as determined by the Supreme Court of the United States." In *Terry Williams v. Taylor*, 529 U.S. 362 (2000), the Court explained that "clearly established" federal law "refers to" the "holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Id.* at 412 (opinion for the Court by O'Connor, J.).

The statute thus instructs a federal court to determine whether a previous state court decision rejecting a claim constituted an unreasonable application of a rule of law established by this Court's then-existing holdings. A federal court undertakes this analysis when it turns to the question whether federal relief can be awarded. In explicit terms, §2254(d) identifies the circumstances under which "[a]n application for a writ of habeas corpus... shall not be *granted*... " (emphasis added). In *Terry Williams*, this Court explained that §2254(d) places "a new constraint on the power of a federal court to *grant* a state prisoner's application for a writ of habeas corpus." *Id.* at 412 (opinion for the Court by O'Connor, J.) (emphasis added).[4]

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[4] The Court has reaffirmed this understanding of §2254(d) on numerous occasions. *E.g.*, *Yarborough v. Gentry*, 124 S.Ct. 1, 4 (2003) (*per curiam*) (stating that if a state court previously rejected a claim a federal court "may *grant relief*" only if the state decision fails one of the tests established by §2254(d)) (emphasis added); *Felker v. Turpin*, 518 U.S. 651, 662 (1996) (stating that §2254(d) "specifies the conditions under

The Court began accounting for §2254(d) and *Teague* in *Terry Williams* and continued the effort in this case when it was here last Term: *Horn v. Banks*, 536 U.S. 266 (2002) (*per curiam*) (*Banks I*). In *Banks I*, the Court explained that the analyses required by §2254(d) and *Teague* are "distinct." *Banks I*, *supra* at 272. With that proposition in place, there must be a way (and there *is* a way) in which the two can be reconciled.

The Court drew the basic distinction between §2254(d) and *Teague* in *Banks I*. By contrast to §2254(d), *Teague* is not addressed to a federal court's authority to grant habeas relief. Instead, the *Teague* doctrine screens claims at the door and determines what claims may pass through for federal consideration. The sequence in which a federal court takes up *Teague* and §2254(d) is plain enough. The *Teague* doctrine comes first as a "threshold" inquiry into the nature of a claim advanced in federal collateral proceedings. *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989). If the respondent properly objects that a claim cannot be considered, a federal court must conduct the *Teague* inquiry "before considering the merits of the claim." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). The court turns to §2254(d) only later.

The Commissioner states the "primary question" in this case as the question whether the rule of law linked to *Mills v. Maryland*, 486 U.S. 367 (1988), "can be applied retroactively" to a claim presented in federal collateral proceedings. Brief of Petitioners, at 14. That formulation is misleading. The primary question is not whether a rule reflected in a decision rendered after a prisoner's sentence became final is retrospectively applicable. It is whether the

which . . . *relief* may be *granted*") (emphasis added); *accord Lindh v. Murphy*, 96 F.3d 856, 870 (7th Cir. 1996) (opinion of Easterbrook, J.) (explaining that §2254(d) "does no more than regulate *relief*") (emphasis added), *rev'd on other gr'ds*, 521 U.S. 320 (1997).

rule on which a prisoner relies is "old" for *Teague* purposes and thus enforceable in federal collateral proceedings. See *Sawyer v. Smith*, 497 U.S. 227, 239-40 (1990) (using the "old rule" formulation). If the rule is "old," its application to the case at hand is not retroactive.[5]

The Commissioner's formulation creates the false impression that Mr. Banks is entitled to rely on older holdings only if those holdings established a rule of law that tracked the language in *Mills* verbatim. That is not what *Teague* contemplates at all. The task is not to seize upon a recent decision implementing a rule of law and then to demand that the prisoner identify an older decision stating the rule in precisely the same way. Rather, the task is to "'surve[y] the legal landscape'" as it was when the prisoner's case was still in the direct review channel, to extract from this Court's holdings at that time the rule of law for which they genuinely stood (articulated at the correct level of generality), and then to determine whether a prisoner's claim fairly rests on that rule. *Caspari v. Bohlen*, *supra* at 390 (quoting *Graham v. Collins*, 506 U.S. 461, 468 (1993)).

The Court explained in *Terry Williams* that the "threshold question under AEDPA" is whether a prisoner "seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." *Terry Williams*, *supra* at 390 (Part III of the opinion by Stevens, J.) (joined by O'Connor, Kennedy, Souter, Ginsburg & Breyer, J.J.); see *id.* at 367 n.*. The conclusion of direct review is, of course, the reference point for *Teague*. To determine whether a rule was "clearly established" at that time, the Court turned

[5] A federal court deals with the retroactive reach of a rule only if it first decides that the rule is "new" for *Teague* purposes and turns to the question whether it can be enforced retroactively to cases arriving in federal court in a collateral posture because it fits one of the exceptions to *Teague's* general ban on "new rule" claims.

to its own contemporaneous precedents. The Court "easily" determined that the prisoner's claim could be considered because it was governed by the rule for ineffective-assistance-of-counsel claims established by *Strickland v. Washington*, 466 U.S. 668 (1984). *Terry Williams*, *supra* at 390.

In *Terry Williams*, accordingly, the Court tied an "old" rule for purposes of *Teague* to clearly established law and, in turn, tied clearly established law to rules of law established by this Court's relevant holdings. That understanding of clearly established law within the meaning of *Teague* corresponds to the meaning the Court gave to the same "clearly established Federal law" language in §2254(d). The rule announced in *Strickland* was both an "old" rule for *Teague* purposes (and thus could support a claim in federal habeas) and also clearly established federal law for purposes of §2254(d) (so that the Court was able to rest on it in determining whether relief could be awarded on that claim).

The pieces of the puzzle thus fall into place. The *Teague* analysis can be undertaken as an initial matter and still there will be room for §2254(d)'s restrictions on relief to operate thereafter. At the doorstep, a federal habeas court will determine whether the claim that a prisoner advances rests on an "old" rule (the rule that this Court's holdings established at the time the prisoner's conviction and sentence became final). If so, the claim can be considered, and the court moves to a second question: whether the claim is meritorious (when judged in light of the rule established by those holdings). If the claim is without merit, it can be dismissed on that ground. E.g., *Weeks v. Angelone*, 528 U.S. 225, 237 (2000). If it is meritorious, the court turns to a third question: whether federal relief can be awarded. If a state court previously rejected the claim on the merits, §2254(d) allows the federal court to grant relief only if the state court decision

was not only erroneous, but also unreasonable.[6]

In this case, the *Teague* question is whether Mr. Banks' claim regarding the way the jury in his case was instructed fairly rests on the rule of law established by *Lockett v. Ohio*, 438 U.S. 586 (1978), and related holdings in place when Mr. Banks' sentence was subject to direct review. The *Teague* analysis, then, is essentially a reprise of *Penry*, where the Court examined those same holdings. Mr. Banks' claim *does* rest on the "old" rule established by *Lockett* and its progeny because, "in light of the jury instructions given, the jury was unable to fully consider and give effect to . . . mitigating evidence." *Penry*, *supra* at 315. The question under §2254(d) is whether the Pennsylvania Supreme Court decision rejecting Mr. Banks' claim was unreasonable. It *was* because the state court misapplied the *Lockett* rule to this case and reached the unreasonable conclusion that Mr. Banks' jury was validly instructed.

The Commissioner and his *amicus* misapprehend the different functions performed by the *Teague* doctrine, on the one hand, and §2254(d), on the other. In their view, *Teague* occupies the space that §2254(d) was enacted to fill. Proceeding from that erroneous premise, they are hard pressed to explain what purpose §2254(d) serves with *Teague* already in place. By their account, *Teague* forces a federal court to defer to a reasonable state court decision on the merits of a federal claim, thus obviating Congress' decision to postpone any inquiry into the reasonableness of a prior state court decision until a federal court decides whether it can grant relief.

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[6] In some instances, this Court has skipped over the question whether the state court "erred" and gone immediately to the question whether relief can be awarded. E.g., *Lockyer v. Andrade*, 123 S.Ct. 1166, 1172 (2003).

The CJLF is aware that its conception of *Teague* invites the question whether the enactment of §2254(d) was an idle gesture. Anticipating that question, the CJLF insists that *Teague* "remains important" primarily in cases in which §2254(d) is inapplicable because no state court previously reached a decision on the merits. Brief of Amicus Curiae, CJLF, in support of Petition for Certiorari, at 11. That argument defeats itself. If *Teague* routinely achieves the result that §2254(d) would produce if it were applicable, the question that has to be answered is not whether *Teague* "remains important," but whether the statute has any meaning at all. If the CJLF's account is correct, it makes no difference whether §2254(d) is triggered in a case by a previous state court decision on the merits. The *Teague* doctrine alone bars habeas adjudication if a judgment rejecting a claim was *or might have been* reasonable at the time the prisoner's conviction and sentence became final.[7]

In the alternative, the CJLF attempts to make room for §2254(d) by carving the *Teague* inquiry into two steps. First, according to the CJLF, a federal district court must determine "whether the precedent the petitioner relies on is a new rule." Second, the court must determine the "distinct question" whether an "extension of that precedent" to the case at bar "would be another new rule." Brief of Amicus Curiae, CJLF, at 26. The CJLF admits that, by its own analysis, the second of these "steps" is "subsumed in the

[7] The CJLF also points out that while §2254(d) focuses on the law as it was when a state court adjudicated the merits of a claim, *Teague* "looks to the state of the law at a different date." Brief of Amicus Curiae, CJLF, in support of Petition for Certiorari at 11. That is true enough. See n.3, *supra*. Yet the point only weakens the CJLF's argument. *Because* §2254(d) attaches significance to the law as it was when the state court acted, it can scarcely be doubted that §2254(d), rather than *Teague*, provides the occasion for deferring to a state court decision that was not unreasonable when rendered.

AEDPA [i.e., the §2254(d)] inquiry." *Id.* Evidently, the CJLF contends that the first step is somehow set apart and not "subsumed" into the work assigned to §2254(d). This argument, too, collapses under analysis.

By the CJLF's account, the question contemplated by the first *Teague* "step" is also the same question that §2254(d) asks the federal court to answer. According to the CJLF, a precedent appearing after a prisoner's conviction and sentence became final announced a "new" rule if it arrived at a result that a state court, entertaining the prisoner's claim before the conclusion of direct review, could reasonably have rejected. That, too, is the question that Congress has reserved for the relief stage governed by §2254(d): whether a previous state court decision on the merits was not only erroneous but also unreasonable. The CJLF gets nowhere by positing that a prisoner might seek federal habeas relief on the basis of *two* "new" rules (one reflected in some recent decision and the other necessarily created if the prisoner is successful in the instant case). Either way, the CJLF's definition of what counts as "old" or "new" for *Teague* purposes entails an inquiry into whether a state court acted or might have acted unreasonably by rejecting a prisoner's claim. Either way, that inquiry usurps any role for §2254(d).

This Court may sensibly consider what is to happen in cases (unlike this one) in which §2254(d) is inapplicable for want of a previous state court decision on the merits. The answer is straightforward. If the respondent properly objects that a claim is *Teague*-barred, the court will apply the "old" rule of law that existed when the prisoner's conviction and sentence became final—that is, the rule established by this Court's holdings at that time. And the court will grant relief if, but only if, the prisoner's claim is meritorious in light of that rule.

In this way, the *Teague* doctrine obviously has implications for the availability of federal habeas relief, but only because *Teague* determines whether a claim can be considered in the first place. The *Teague* doctrine does not restrict a federal court's options in the way that §2254(d) would; when *Teague* alone operates, relief can be awarded without a determination that a previous state court decision was unreasonable. Yet *Teague* does accommodate state interests by restricting the federal court's attention to rules of law established by this Court's holdings when the prisoner's case was still subject to direct review.

II. THE DESCRIPTIONS OF "OLD" AND "NEW" RULES ON WHICH THE COMMISSIONER AND HIS *AMICUS* RELY SHOULD NOT BE READ TO MEAN THAT *TEAGUE* BARS A CLAIM UNLESS IT WOULD HAVE BEEN UNREASONABLE FOR A STATE COURT TO REJECT THE CLAIM AT THE TIME THE PRISONER'S CONVICTION AND SENTENCE BECAME FINAL

The Commissioner and his *amicus* contend that, wholly apart from §2254(d), the *Teague* doctrine instructs federal courts to defer to reasonable state court decisions on the merits of federal claims. In support of their argument, they cite certain descriptions of "old" and "new" rules appearing in this Court's precedents.

In *Teague* itself, the Court said that a "case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, *supra* at 301 (emphasis in original).[8] In *Butler v. McKellar*, 494 U.S. 407, 415 (1990), the Court said that a case announced a "new" rule because the "outcome" was

[8] *See also Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997).

"susceptible to debate among reasonable minds."[9] In *Saffle v. Parks*, 494 U.S. 484, 488 (1990), the Court said that a prisoner's claim rests on an "old" rule if "a state court considering [the] claim at the time [the prisoner's] conviction became final would have felt compelled by existing precedent to conclude that the rule [the prisoner] seeks was required by the Constitution."[10] In *Sawyer v. Smith*, 497 U.S. 227, 234 (1990), the Court said that *Teague* "serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." In *Stringer v. Black*, 503 U.S. 222, 228 (1992), the Court said that a "new rule" can be created if a "prior decision is applied in a novel setting, thereby extending the precedent."

The Commissioner and his *amicus* interpret these descriptions to mean that *Teague* forecloses any claim advanced in federal collateral proceedings, unless there was only one reasonable judgment that a court could reach regarding the claim in the circumstances of the particular case at the time the prisoner's conviction and sentence became final: a judgment in the prisoner's favor. That understanding would dismantle the framework for federal habeas proceedings that Congress enacted in AEDPA. No one would so much as get in the door to advance a claim without first establishing that the claim is so obviously meritorious that no court could reasonably have rejected it when the case was still subject to direct review.

This Court has not conditioned a federal court's authority to entertain a claim on an *a priori* demonstration that the claim is meritorious—and has been meritorious since the petitioner's conviction and sentence became final.

[9] *See also O'Dell v. Netherland*, 521 U.S. 151, 156 (1997).

[10] *See also Graham v. Collins*, 506 U.S. 461, 467 (1993).

Instead, the Court has explained that the threshold *Teague* inquiry occurs "before" the federal court has occasion to consider "the merits." *Caspari v. Bohlen*, *supra* at 383. In *Penry*, for example, the Court first determined that the prisoner's claim rested on a rule of law that this Court had established in holdings delivered prior to the conclusion of direct review. Then, as an independent matter, the Court took up the prisoner's contention that the "old" rule of law had been violated "*in his particular case*." *Penry*, *supra* at 318 (emphasis in original).[11]

To be sure, a federal court's application of an "old" rule to the facts of a particular case can sometimes be virtually submerged in the initial determination whether the prisoner's claim can sensibly be said to rely on the "old" rule at all. If the facts of the prisoner's case range significantly beyond the facts of the cases in which this Court announced the "old" rule, there may be a nice question whether he has a chance of succeeding on the merits only if the "old" rule is altered into something "new." Problems of this sort are worked out when a habeas court determines the content of the "old" rule at the correct level of generality. If, once the rule is properly articulated, the prisoner has no reasonable chance of succeeding when that rule is applied to his case, the court may conclude that his claim does not rest on the "old" rule after all and thus is *Teague*-barred.

Yet the existence of hard cases does not alter the nature of the *Teague* inquiry as a search for the "old" legal

[11] *Accord Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000) (explaining that a rule could be enforced in habeas because it rested on old precedents); *id.* at 487 (finding the record insufficient to determine whether that rule had been violated and remanding for further proceedings below); *Stringer v. Black*, *supra* at 237 (also concluding that a prisoner's claim was not foreclosed by *Teague* and remanding for further proceedings).

rule that properly governs a claim. Most legal doctrines demand difficult judgments when they are implemented at the borderline. The subtleties in some cases conceded, the *Teague* doctrine remains concerned with identifying the rules of law that this Court had established at the time.

A. The Descriptions On Which The Commissioner And His *Amicus* Rely Appeared Before The Court Turned To The Task Of Reconciling *Teague* With §2254(d)

The descriptions of "old" and "new" rules in *Teague* itself obviously coincided with the announcement of a different approach to the problem presented when rules of law shift over time. The Court did not propose that it had worked out all the details of the new *Teague* doctrine, but rather explicitly disclaimed any "attempt to define the spectrum of what may or may not constitute a new rule . . . ." *Teague*, *supra* at 301.

More importantly, the descriptions in *Teague*, *Butler*, *Parks*, *Sawyer*, and *Stringer* appeared before the enactment of §2254(d). Those descriptions have been repeated without re-examination as part of the introduction with which opinions applying the *Teague* doctrine typically begin. The Court did not face the task of reconciling *Teague* with §2254(d) until *Terry Williams* and *Banks I*, when the Court adopted an understanding of *Teague* that makes sense in light of the new statute.

B. The Descriptions On Which The Commissioner And His *Amicus* Rely Neglect The Elaboration Of *Teague* In *Wright v. West*

If the Commissioner and his *amicus* are right, *Teague* is no longer a doctrine about the consequences that ensue when rules of federal law change. Instead, *Teague* has evolved into a blanket injunction that federal courts must defer to reasonable state court decisions. That idea invites

attention to *Wright v. West*, *supra*, where the Court entertained the question whether federal habeas courts should discard the practice of examining federal claims *de novo* and, instead, "afford deference to state-court determinations applying law to the specific facts of a case." *Id.* at 284.

Writing for the Court in *West*, Justice Thomas discussed arguments that would support an affirmative answer and, in that context, said that the Court had already "implicitly questioned" the "*de novo*" standard in *Teague* and related cases, especially *Butler*. Justice Thomas stated the *Teague* doctrine this way: "[I]f a state court has reasonably rejected the legal claim asserted by a habeas petitioner under existing law, then the claim seeks the benefit of a 'new' rule under *Butler*, and is therefore not cognizable on habeas under *Teague*." *West*, *supra* at 291.

Concurring in the judgment in *West*, Justice O'Connor explained that Justice Thomas' opinion "mischaracterize[d]" *Teague*. *West*, *supra* at 303 (O'Connor, J., concurring in the judgment). The *Teague* doctrine, she explained, creates no "deferential standard of review" to be applied to state court decisions applying "old" rules. *Id.* at 303-04. By contrast, *Teague* prevents federal habeas courts from giving prisoners the benefit of "new" rules. *Id.* The *Teague* doctrine "simply requires that a state conviction . . . be judged according to *the law in existence* when the conviction became final." *Id.* at 304 (emphasis added).

Justice O'Connor further explained in *West* that in order to determine what counts as a "new" rule, "*Teague* requires courts to ask whether the rule . . . can be meaningfully distinguished from that established by *binding precedent* at the time [the] conviction became final." *Id.* (emphasis added). Justice O'Connor acknowledged that the Court had referred to the reasonableness of a previous state court decision. Yet she explained that statements of that kind

only mean that the question whether a rule is "new" is determined on an "objective standard." And "[i]f a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which *the precedent's underlying principle* applies, the distinction is not meaningful, and *any deviation from precedent* is not reasonable." *Id.* (emphasis added).

The CJLF argues that its understanding of *Teague* can be "distilled" from Justice O'Connor's account in *West*. Brief of Amicus Curiae, CJLF, at 3. Yet the CJLF actually asks the Court to depart from Justice O'Connor's analysis by "drop[ping]" her caveat that any proposed distinction between a recent precedent and previous decisions must be "meaningful." *Id.* at 11. To its credit, the CJLF does not propose that the Court should rest on a meaning*less* distinction. But the CJLF *does* contend that a recent precedent announced a "new" rule if there is any "*arguably material* factual distinction" between that precedent and previous cases. *Id.* (emphasis in original).[12]

The CJLF acknowledges that the purpose of its proposed amendment to Justice O'Connor's analysis is to conform her account of *Teague* to the CJLF's own. Here again, the CJLF insists that if "reasonable jurists *could* conclude" that a recent precedent deviates from the decisions that were in place when a case was subject to direct review, the precedent must necessarily announce a "new" rule. *Id.* at 7. But that is precisely the view that Justice O'Connor rejected. She explained that while a state court's treatment of a claim is "especially valuable," it does not follow that "a

[12] This formulation confuses *Teague* with the "contrary to" clause in paragraph (1) of §2254(d). See *Terry Williams*, *supra* at 406 (explaining that a state court decision fails the "contrary to" test if the state court's result is different from the result the Court itself reached in a prior case in which the facts were "materially indistinguishable").

state court's *incorrect* legal determination has ever been allowed to stand because it was *reasonable*." *West*, *supra* at 305 (O'Connor, J., concurring in the judgment) (emphasis added).

In another separate opinion in *West*, Justice Kennedy dismissed any suggestion that "the *Teague* line of cases is on a collision course" with cases holding that a state court's application of existing law to the facts of a particular case is open to *de novo* examination in federal habeas. *West*, *supra* at 306 (Kennedy, J., concurring in the judgment). Justice Kennedy acknowledged that "the fact that [the] standard for distinguishing old rules from new ones turns on the reasonableness of a state court's interpretation of then existing precedents suggests that federal courts do in one sense defer to state-court determinations." *Id.* at 307. He explained, however, that "the purpose of the reasonableness inquiry where a *Teague* issue is raised . . . is to determine whether application of a new rule would upset a conviction that was obtained in accordance with *the constitutional interpretations existing* at the time." *Id.* (emphasis added). This is the best understanding of the idea that *Teague* "validates reasonable, good-faith *interpretations of existing precedents* made by state courts even though they are shown to be contrary to later decisions."[13] State courts are supposed to follow the rules this Court has laid down. If state courts do that, federal habeas courts will not change the rules later.

Justice Kennedy recognized that federal habeas law sometimes serves a "comity interest" by "saying that since the question is close the state-court decision ought to be deemed correct because [federal courts] are in no better position to judge." *West*, *supra* at 308 (Kennedy, J., concurring in the judgment). But that is "not the comity

[13] *Butler*, *supra* at 414 (emphasis added).

interest that underlies *Teague*." Instead, "[t]he comity interest served by *Teague* is in not subjecting the States to a regime in which finality is undermined by our changing a rule once thought correct but now understood to be deficient on its own terms." *Id.* And "[i]t is in recognition of this principle that [federal habeas courts] ask whether the decision in question was dictated by precedent." *Id.*

In yet another separate opinion in *West*, Justice Souter also clarified *Teague's* role in the mix of doctrines and statutes governing federal habeas corpus. He explained that "[t]he crux of the analysis when *Teague* is invoked . . . is identification of the rule on which the claim for habeas relief depends." *West*, *supra* at 311 (Souter, J., concurring in the judgment). If that rule is "'old' enough to have predated the finality of the prisoner's conviction, and specific enough to dictate the rule on which the conviction may be held unlawful," the claim can be entertained in federal court. *Id.*

Four years after *West*, Congress enacted AEDPA, which extinguished any possibility that *Teague* might yet mutate into a general rule of deference to reasonable state decisions on the merits of federal claims. This Court explained in *Terry Williams*, *supra*, that Congress addressed the debate within the Court in *West* and drew the very distinction that Justice O'Connor had identified between an "*incorrect* or *erroneous*" state court application of federal law, on the one hand, and an "*unreasonable*" application of federal law, on the other. *Terry Williams*, *supra* at 412 (opinion for the Court by O'Connor, J.) (emphasis in original). That distinction, in turn, differentiated the separate spheres in which *Teague* and the statute function. Congress maintained *Teague* as a door-keeping doctrine that limits federal habeas to claims based on "old" rules and located attention to the reasonableness of prior state court decisions in §2254(d), which governs the subsequent question whether relief can be awarded with respect to claims that *Teague*

allows federal courts to entertain.

C. The Descriptions On Which The Commissioner And His *Amicus* Rely Need Not Be Read The Way The Commissioner And His *Amicus* Read Them

The descriptions on which the Commissioner and his *amicus* rely do not demand the problematic interpretation that the Commissioner and his *amicus* ascribe to them. Instead, read carefully and in context, those descriptions lend themselves to an interpretation more in keeping with *Terry Williams* and *Banks I*.

The Commissioner and his *amicus* argue, for example, that the "result" in a case was "dictated by precedent" if that result constituted the only reasonable judgment available in the particular circumstances presented. That is scarcely the most sensible, far less the only, understanding of the "dictated by precedent" phrase.

The Court has made it clear that a rule is "old" for *Teague* purposes if the rule itself (not the result of its application in a particular case) was "dictated by precedent." *Penry*, *supra* at 319 (explaining that the rule on which the prisoner relied was "old" because it was dictated by prior decisions); accord *Parks*, *supra* at 488 (explaining that in *Teague* the Court "defined a new rule as a rule . . . that was not '*dictated* by precedent'") (emphasis in original).

The "dictated by precedent" phrase may only distinguish the two ways in which a court commonly invokes pre-existing authority. On the one hand, a court may seek guidance from precedents under the familiar rubric of *stare decisis*. Where that is true, the rule of law the court articulates (as well as the result it reaches in the case at hand) may contribute to the evolution of the law. On the other hand, a court may invoke precedents in the much harder sense that it follows the rules of law established

authoritatively by their holdings. It is where that is true that it is most natural to say that the rule the court identifies (and, for that matter, the result it reaches) are "dictated by precedent."[14]

When this Court has established a rule of federal law in a holding, lower courts (state and federal) do not treat that rule as a guide in analogous cases in the comparatively loose sense of *stare decisis*. They embrace it as the authoritative law of the land, laid down by this Court which sits at the top of the judicial hierarchy as the ultimate arbiter of the meaning of federal law. *Rodriguez de Quijas v. Shearson/American Express,* 490 U.S. 477, 484 (1989). Accordingly, a rule is "old" if it operates on lower courts not as a guide in the *stare decisis* sense, but rather as this Court's authoritative articulation of federal law to which lower courts are duty-bound to adhere.

The argument that a rule is "old" for *Teague* purposes only if it dictated a result favorable to the prisoner in a particular case necessarily faces yet another obstacle. It blurs the familiar distinction between questions of pure law, on the one hand, and mixed questions of law and fact (the application of law to particular facts) on the other. It thus attacks the very proposition on which *Teague* is founded: the proposition that rules of law announced by this Court *exist*, that they have real meaning in the world, and that they must be followed until they are changed.

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[14] The Court has drawn this very distinction in explaining the difference between cases that come to this Court itself in collateral proceedings (and thus are subject to *Teague*) and cases that arrive here on direct review (where *stare decisis* provides the guide). *Johnson v. Texas*, 509 U.S. 350, 352-53 (1993) (explaining in a direct review case that *Teague* was inapplicable but the Court would look to past precedents with "customary respect for the doctrine of *stare decisis*").

Obviously, the *Teague* doctrine contemplates that a rule of law must be identified at a sensible level of generality. Articulating "old" law in an excessively abstract way would defeat *Teague* altogether—by admitting claims genuinely based on a wide variety of discrete rules under cover of an overarching rule defined broadly enough to subsume them all. Equally, articulating "old" law in an excessively fact-specific manner would also defeat *Teague*—by foreclosing claims based on rules of law as they were defined authoritatively in this Court's precedents.

A rule of law necessarily has *some* field of operation apart from its implications for a particular fact pattern. If it didn't, it wouldn't be a rule.[15] The *Teague* doctrine requires a federal habeas court to identify the rule on which a prisoner's claim depends and to identify that rule at the right level of generality. The CJLF conceives that the *right* level of generality is always the *lowest* level: a description of the disposition of a particular dispute in light of the material facts. That does not follow at all. The task is to identify an "old" rule at the *accurate* level, the *correct* level, the level that captures the rule's true authoritative content.

The CJLF asks the Court to rely on classic accounts of the narrowest way that a common law decision can be understood.[16] That line of analysis is entirely inapposite in this context, where the question is the meaning of this Court's decisions announcing rules of constitutional law.

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[15] In *Yates v. Aiken*, 484 U.S. 211 (1988), for example, the Court held that a recent case had not announced a "new" rule but merely applied "the principle that governed" a previous case decided before a prisoner's conviction and sentence had become final. *Id.* at 216-17; *Penry*, *supra* at 314.

[16] Brief of Amicus Curiae, CJLF, at 6-7 (citing Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L.J. 161 (1930)).

This Court selects cases for review not merely to correct errors below, nor to do justice to the immediate parties, but rather to use the cases it picks as vehicles for elaborating authoritative federal law. The CJLF's proposal to limit the rules announced in holdings to a recitation of the Court's results in light of the material facts fails to appreciate the Court's role as the final arbiter of the Constitution's meaning.[17]

This Court obviously cannot revisit constitutional problems very often. When it selects a particular case for review, accordingly, the Court does not simply reach a disposition on the facts of that case and leave lower courts to deduce the rule of law they are to follow in future cases. Instead, the Court typically articulates rules in a sharper, clearer (rule-like) manner, which facilitates understanding and effective implementation.[18] Those are the rules of law announced in this Court's holdings and, accordingly, they are the "old" rules on which prisoners can rest in federal collateral proceedings.

In some instances, the Court articulates rules at a fairly specific level of generality. A rule of that kind cannot be applied in a wide range of circumstances without periodic adjustments in its content. In other instances, the Court articulates rules at a relatively high level of generality. A rule of that kind can be (and is meant to be) invoked in different factual contexts without producing a change in the rule itself.

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[17] Even in the common law context, Professor Goodhart disclaimed the notion that a "judge who writes an opinion will be wasting both his own time and ours." *Id.* at 168. Goodhart did not propose that the rules of law stated in judicial opinions should be ignored, only that they should be read carefully and in context.

[18] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

In *West*, *supra*, Justice Kennedy explained that the rule established in *Jackson v. Virginia*, 443 U.S. 307 (1979), fits this description. *West*, *supra* at 308 (Kennedy, J., concurring in the judgment). The rule established by *Strickland*, *supra*, is another illustration. And, as Mr. Banks' brief demonstrates, the rule established by *Lockett*, *supra*, and related decisions is yet another.

Nothing in *Teague* vanquishes the familiar distinction between a rule of law itself and the application of that rule in a particular instance.[19] The Court has said that "gradual developments" can constitute "new" rules, *Sawyer*, *supra* at 234, and that a rule can be extended into something "new" if it is applied in a truly "novel setting." *Stringer*, *supra* at 228. But those observations must be read in context.[20] The Court has scarcely held that *Teague* automatically prevents federal courts from applying "old" rules to different fact patterns in the run of cases. The "[o]ne *general* rule that has emerged under *Teague* is that application of existing precedent in a new factual setting will *not* amount to announcing a new rule." *Graham*, *supra* at 506 (Souter, J., dissenting) (emphasis added) (explaining that a prisoner need not "point to an old case decided on facts identical to the facts of his own case") (quoting *West*, *supra* at 313 (Souter, J., concurring in the judgment)).

[19] *Cf. INS v. St. Cyr*, 533 U.S. 289, 300-08 (2001); *Miller v. Fenton*, 474 U.S. 104, 113-14 (1985).

[20] In *Sawyer*, the Court was only explaining that federal habeas is not a "mechanism for the continuing reexamination of final judgments based upon later emerging doctrine." *Sawyer*, *supra* at 234. In *Stringer*, the Court was only explaining that *Teague* bars a habeas court from itself fashioning a "new" rule and then applying that rule to a claim.

D. The Descriptions On Which The Commissioner And His *Amicus* Rely Played No Significant Role In The Cases In Which The Court Has Actually Decided Whether Claims Can Be Considered

The descriptions of "old" and "new" rules on which the Commissioner and his *amicus* rely have had little or nothing to do with this Court's analysis of actual *Teague* cases. Certainly, the understanding of *Teague* that the Commissioner and the CJLF urge the Court to adopt cannot be squared with those cases. The CJLF admits as much. According to the CJLF, it is "not surprising" that the Court has typically found rules to be "new." Brief of Amicus Curiae, CJLF, at 12. Cases usually reach this level only when there is a divergence of opinion below, and since most disagreements between lower courts are reasonable the Court knows that a rule is "new" before it begins its analysis. *Id.*

This proves too much. If the CJLF is right, this Court has engaged in a charade whenever it has purported to grapple with the question whether a rule is "old" or "new" for *Teague* purposes. Any rule that gets this far must be "new" or lower courts wouldn't be arguing about it. As though to underscore the point, the CJLF insists that two cases in which the Court found a rule not to be "new" (*Penry* and *Stringer*) can be justified only in ways the CJLF finds dissatisfying and thus probably should be overruled. Brief of Amicus Curiae, CJLF, at 12-16.

There is a reason why the CJLF cannot explain this Court's *Teague* decisions. The CJLF contends that a rule of law can have only the uncontestable content reflected in its application to a particular set of facts. Accordingly, the CJLF cannot comprehend how justices of this Court might engage in a sensible debate about that content. But justices of the Court obviously *can* debate the content of a rule. That debate

takes the form of arguments about the correct level of generality at which a rule of law established by prior holdings should be understood.

The CJLF looks back at this Court's cases implementing *Teague* and conceives that the question was whether a prisoner's claim might reasonably have been rejected in light of the rule of law established by relevant holdings. If so, according to the CJLF, the claim depended on a "new" rule and could *not* be entertained in federal habeas. That understanding is precisely backward. The question in those cases was first and foremost the accurate level of generality at which relevant holdings established a rule of law. Once an "old" rule was correctly articulated, a prisoner's claim *could* be entertained if it fairly depended on that "old" rule—that is, if there was a reasonable argument that the claim would prove to be meritorious when the "old" rule was applied to the circumstances of the prisoner's case. Whether the claim in a particular case was meritorious when judged against an "old" rule was another question (the merits). And whether federal habeas relief might yet be barred because a previous state decision on the merits was not unreasonable (the question assigned to §2254(d)), was yet another.

In some cases, the Court found the correct level of generality easy to identify. In *Terry Williams*, for example, all members of the Court agreed that the applicable "old" rule of law was the rule established by *Strickland*, *supra*. That rule was not simply a statement of the result the Court had reached on the facts of *Strickland* itself. Instead, the "old" rule in *Strickland* was the doctrinal rule the Court announced to govern that case and other cases in the future.[21] In other

[21] Of course, the Court has allowed habeas courts to entertain claims based on the general doctrine announced in *Strickland* on numerous occasions. This, notwithstanding that when the Court applied that doctrine to the fact pattern in *Strickland* itself, the Court concluded that the prisoner's claim was without merit. If the rule for which *Strickland* stands were limited to the result in that case in light of the material facts, it would follow that *Strickland* announced no rule of law at all that might be useful to any other petitioner and, accordingly, that all the cases in which the Court has allowed claims depending on *Strickland's* doctrine were misconceived.

instances, members of the Court were sharply divided over the most accurate articulation of the "old" rule for which its relevant holdings stood. E.g., *Gilmore v. Taylor*, 508 U.S. 333 (1993); *Gray v. Netherland*, 518 U.S. 152 (1996). Here again, hard cases at the margin have arisen, and some of them have come here for resolution. Yet the core point of the *Teague* analysis has never varied. A federal court entertaining a case in a collateral review posture considers a claim if it fairly rests on a rule of law, correctly understood, found in this Court's holdings before the prisoner's conviction and sentence became final.

We do not deny that some descriptions of *Teague* may have obscured *Teague's* character and function and provided the Commissioner and his *amicus* with rhetorical fodder for their argument that *Teague* bars a claim from federal habeas unless it would have been unreasonable to reject it when a case was still subject to direct review. But we do deny that the Court has actually transformed *Teague* in that way and, in so doing, has defied Congress' decision to attend to the reasonableness of a previous state court judgment at the relief stage of the process in federal court.

In short, there is a way to reconcile *Teague* and §2254(d) that respects the framework that Congress established in AEDPA and brings coherence to the law. In stark contrast, the Commissioner and his *amicus* urge the Court to adopt an understanding of *Teague* that cannot be squared with AEDPA, with this Court's own account of *Teague* in *Terry Williams* and *Banks I*, or with key decisions on what counts as an "old" or "new" rule.

CONCLUSION

For the reasons stated above and in the brief by Mr. Banks, the Court should affirm the judgment below.

Respectfully submitted,

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